

# Middlesex University Research Repository

An open access repository of

Middlesex University research

<http://eprints.mdx.ac.uk>

Grossman, Andrzej (2002) The trusted mediator: developing an ethical framework for the professionalisation of commercial mediation. DProf thesis, Middlesex University. [Thesis]

This version is available at: <https://eprints.mdx.ac.uk/6471/>

## Copyright:

Middlesex University Research Repository makes the University's research available electronically.

Copyright and moral rights to this work are retained by the author and/or other copyright owners unless otherwise stated. The work is supplied on the understanding that any use for commercial gain is strictly forbidden. A copy may be downloaded for personal, non-commercial, research or study without prior permission and without charge.

Works, including theses and research projects, may not be reproduced in any format or medium, or extensive quotations taken from them, or their content changed in any way, without first obtaining permission in writing from the copyright holder(s). They may not be sold or exploited commercially in any format or medium without the prior written permission of the copyright holder(s).

Full bibliographic details must be given when referring to, or quoting from full items including the author's name, the title of the work, publication details where relevant (place, publisher, date), pagination, and for theses or dissertations the awarding institution, the degree type awarded, and the date of the award.

If you believe that any material held in the repository infringes copyright law, please contact the Repository Team at Middlesex University via the following email address:

[eprints@mdx.ac.uk](mailto:eprints@mdx.ac.uk)

The item will be removed from the repository while any claim is being investigated.

See also repository copyright: re-use policy: <http://eprints.mdx.ac.uk/policies.html#copy>

MX 0102254 7



2

## **THE TRUSTED MEDIATOR**

**Developing an ethical framework for the professionalisation of commercial mediation.**

*A project submitted to Middlesex University in partial fulfilment of the requirements for the degree of Doctor of Professional Studies.*

**Andrzej Grossman**

**National Centre for Work Based Learning Partnerships  
Middlesex University**

**Submitted July 2002**

P1144675

Site <del>WITHE</del>	MIDDLESEX UNIVERSITY LIBRARY
Accession No.	C 102254
Class No.	347.4209 G20
Special Collection ✓	

## ACKNOWLEDGEMENTS

My thanks to colleagues Anthony Allen, Henry Brown, Tony Curtis, Frances Maynard, David Miles, David Richbell, Elizabeth Rivers and Roger Tabakin who allowed me to interview them.

Last but not least, my thanks to Professors Derek Portwood and Peter Newby for their support and guidance throughout this project.

Andrzej Grossman

July 2002

CONTENTS

Acknowledgements	2
Figures	4
Summary	5
Introduction	6
1 Methodology and approach	10
2 Transforming the civil justice system	19
3 What is a profession?	32
▪ Families of ethical theory and approaches to the professions	39
▪ Ethical status	45
4 What do we mean when we say trust?	52
5 Personal values: role identity, motivation and responsibility	63
6 Virtuous mediators	72
7 The Trusted Mediator	90
Bibliography	100

FIGURES

Fig 1	The trusted mediator: the problem of reconciling competing values	16
Fig 2	CEDR re-branding: perceptions of commercial mediation and CEDR	26
Fig 3	CEDR re-branding: lack of sector definition	26
Fig 4	CEDR re-branding: tension in perceived CEDR values	27
Fig 5	The cross-disciplinary architecture of mediation	28
Fig 6	CEDR re-branding: mediation and professional expertise	28
Fig 7	CEDR re-branding: CEDR's corporate personality	30
Fig 8	Value research: core model	67
Fig 9	Contrasting ethical frameworks	91

## SUMMARY

This paper is written from the standpoint of a participant observer and forms an exploratory case study examining the ethical dimension of commercial mediation in the context of its professionalisation. It brings together a series of papers written between April 2001 and June 2002. They are presented here in a revised form and different order as chapters oscillating between the changing context of commercial mediation and a discussion of particular sociological and ethical concepts.

The paper attempts to identify the theoretical territory of the study of professions and professionalisation and the ethical perspectives and moral categories which describe the territory. It addresses the problems encountered in attempts to develop an abstract theory of professions which has generally been polarised between attribute and processual approaches. Issues which emerge include conflicts of professional roles arising from different understandings of what a profession is for, the duty of a profession to serve the public good, the legitimacy of professional authority and the accountability of professionals. These issues are often expressed as a tension between the ideal of autonomy of a profession and consumer demand for accountability; a tension between the principles of service on which a profession is said to be ethically based and an ethics of responsibility demanded by the market. At the same time, the economic context in which professions emerge and develop gives rise to ethical considerations about the effects of the dominant economic system and the function of trust as an element of social capital.

The approach in this paper is to take professionalisation as a dynamic and historical concept which involves both an ideological and ethical strategy in the development of an occupational group. It suggests that ethical perception in professionals could develop more practically by freeing the conceptualisation of professions from making distinctions in ethical roles between professions and business based on the oppositions of shared and self interest. The relevant emphasis rests not in what professionals do and how long they take to learn to do it but who professionals are as persons; that is, the difference between being a professional and being professional. But clearly professional work does not lie in just 'being'. The degree to which a professional is required in commercial mediation is one that the concept of the trusted mediator must account for. Using this concept to develop an ethical framework, the paper finally discusses policy implications regarding the professionalisation of commercial mediation.



## INTRODUCTION

### **Context: professionalising commercial mediation**

The story of commercial mediation in the UK really starts in 1989 with the formation of IDR Europe Ltd. (now ADR Group) followed in 1990 by the establishment of the Centre for Dispute Resolution (CEDR), which was backed by the Confederation of British Industry and specifically set up to promote and advance the field. But it is in the last six years that commercial mediation practice has accelerated and has been associated with a series of key events underpinned by increasing government interest and support. With this support also came the government's call for professionalism:

*'It is in the interests of those who provide ADR to ensure that their services are professional, governed by universally-recognised competencies and, above all, to ensure that they provide a service that people do need...Those who are able to offer competent and successful ADR and mediation services will find they are part of a burgeoning-and a profitable-new profession' (The Lord Chancellor, Jan 1999. Inaugural lecture to the Faculty of Mediation and ADR of the Academy of Experts).*

Commercial mediation, however, represents only one area of mediation practice. The Advisory Conciliation and Arbitration Service (ACAS) has provided a mediation service in the industrial relations sector since 1974, and the family and community sectors have been developing independently since the early 1990s. New areas such as personal injury and clinical negligence are now also beginning to come into prominence. In addition, mediation is practised by both lawyers and non-lawyers, by volunteers, paid practitioners, and is familiar to international diplomacy, many religious groups and cultures.

But as part of a new social phenomenon, commercial mediation in the UK has yet to respond to questions regarding professionalisation and the parallel development of ethical perception in practitioners beyond regulatory measures and codes.<sup>1</sup> Experience in North America and Australia, where commercial mediation has a longer history, points to related concerns.

---

<sup>1</sup> It has been pointed out that unlike most other professional services, the offer of mediation requires that at least two clients commit themselves to the service. This is further complicated in that the decision to commit is often made by more than one person. Because of this it can be argued that the potential exploitation of individual clients is restricted and that the justification of regulation is limited to special circumstances: for example, agreements which may affect third parties such as minors or cases in which the mediator is not sensitive to the issue of power imbalances in carving out agreements which may be considered unfair. (Mackie, 1997: pp. 377-378)

Morris (1997) has referred to debates on the professionalisation of dispute resolution in North America as a policy debate at ethical level. One of the questions she raises is how far a growing 'profession' (her parentheses) should influence the definition of mediation or how it is practised.

Policy on ethics in mediation practice is related to what different types of mediation are claimed to offer and the values attributed to them. These claims will differ in accordance with the different objectives (moral objects) which are considered to be served by mediation processes which could include one or a combination of social order, social transformation, social justice, or party autonomy and self-determination.

Morris says that policy makers need to balance methods of accountability which do not harbour 'prestige-building and monopoly-seeking by opportunists who see mediation as an opportunity to be part of a growth industry' and warns that 'policy makers need to be aware of moves toward an elite, exclusive, formalised profession which promote North American values of autonomy and objectivity and ignore the spectrum of cultures and types of practice in dispute resolution'<sup>2</sup> (Morris, 1997: p.345). In Australia it has also been asked whether mediation will 'be distorted so that it actually reinforces the broader social ideologies and come to have a system maintenance function' (Boulle, 2000: p7).

These views indicate that it is difficult to ignore the dominant values of the free market. Individualism, self-governance, equality and the security and advancement of private enterprise form the economic context in which mediation in western society is developing. Mediation can be said to already share some of the values of the market place; there is an emphasis on privacy and confidentiality, self-interest and dispute ownership, all of which are seen as the plus points of commercial mediation and appear to point to a decrease in the area of direct state influence and activity.

However, mediation can include other values such as collaborative problem-solving, community solidarity and empowerment. How do these non-market values square with the prevailing social and economic climate at a global level where the boundaries of financial investment are being eroded through an increasing shift in power from governments to financial institutions and increasing cross-border operations by business and the professions? (Boulle, 2000) Also, how do the personal values of individuals in mediation practice square with those of the publicly expressed values of the professional group or organisation with which they are associated?

---

<sup>2</sup> *The focus of ethics here is on inter-personal relations and interdependent communities of mediators. To reflect this interdependence Morris suggests we turn from an ethics of rights to an ethics of responsibility. However it is not clear whether this refers solely to the responsibility of the mediator community to the public generally or includes personal responsibility to the mediator community or, indeed, both.*

In addressing Morris' and Boulle's concerns, perhaps we are still left with having to give a contemporary response to some of the claims made in an unprecedented assault on professionals:

*'As moral entrepreneur, he [the professional] acts the role of priest. He creates the need for his mediation. As crusading helper, he acts the part of the missionary and hunts down the underprivileged. Public affairs pass from the layperson's elected peers into the hands of a self-accrediting elite'* <sup>3</sup> (Illich, 1978: p.65).

Ignoring the fact that Illich is silent on the matter of what part laypersons have played in their own downfall and that we are not given an account of how the state acts as 'supreme manager of professional services', how do we deal with the problem of the 'moral entrepreneur?'

## Trust

One way of looking at this could be to acknowledge that trust building groups may be increasingly important in a global society and that the way we look at trust, at both individual and organisational level, may be more engaging if we divert the focus of our attention from the theoretical polarisation of duty and agent ethics to look at human capacities (character) defined by the virtues. The potential for this may be found in one of the findings in a survey jointly initiated by CEDR and the law firm of Pinsent Curtis in April 2000.<sup>4</sup>

In response to the question 'what personal qualities would you look for when appointing a mediator to resolve a business dispute?' the top five qualities in order of priority were considered to be:

- expertise in the particular sector of dispute
- professionalism
- impartiality
- knowledge of the law
- integrity <sup>5</sup>

---

<sup>3</sup> Illich's use of the word *mediation* refers to the intervention of a professional not a mediator.

<sup>4</sup> Telephone poll of UK law firms carried out by Market and Opinion Research International.

<sup>5</sup> Other qualities listed (in descending order) were, *empathy, specialist in mediation, diplomacy, charisma, pragmatism, industry qualifications, patience, personality, good negotiating skills, intelligence, gravitas/maturity and methodical /attention to detail.*

The attribution of values to commercial mediators is significant in that the term 'professionalism' is identified as a separate value from expertise, impartiality and integrity; values which are otherwise easy to assume as being encompassed by the term.

Morris features 'the trusted mediator' as the concluding title in her analysis of ethics in mediation but does not leave room for the possibility that the social function and meanings of trust may change or relate in different ways to our understanding of the term profession. Where Morris, ends with the concept of the trusted mediator and the 'warning-bells' of professional self-interest, this project starts with the *trusted mediator* as the organising concept to be studied.

## 1 METHODOLOGY AND APPROACH

*'The professional worker can subject himself to the institutionalism and codified ethics and etiquette of his professional association, and conform to the principles of scientific objectivity, but to act on these rationally and logically he must use his own living desires and make the best use of his own personality'.*  
(Halmos, 1970: p.185)

Much of what has been written about commercial mediation has come out of the practical experience of leaders in the field. Together with the research objectives and findings of pilot mediation schemes and consultation papers initiated by government departments, the literature is based upon certain values which may begin to reflect a broader view of the social function of commercial mediation. Also, in following the particular requirements of a role, people very often publicly articulate prescribed values whilst conceding them in private. But it is the extent to which a person may come to privately accept the values expressed publicly in the particular social role that is the starting point here. This transformation or role adaptation has been highlighted by Halmos (1970) and has a parallel in this research in that (adapting the words of Halmos) we can begin to explore whether the social role of commercial mediator can be seen as a sociological category; that is as a role constituting a set of functions without inferring that this set of functions has been institutionalised.

Using CEDR and a number of its influential commercial mediators as a single case, the goals of this exploratory case study are:

- (1) to see to what extent these commercial mediators privately accept the publicly expressed values and moral assumptions of commercial mediation
- (2) how this squares with their motivation to practise in the field and
- (3) the extent to which their responses may be adequately expressed through the concept of the trusted mediator and used as a potential ethical framework for the professionalisation of commercial mediation.

### **Qualitative research methodology**

To describe the methodological approach we are adopting, we first need to distinguish between *scientific understanding* which aims to explain appearances, and *intentional understanding* which aims to interpret those appearances through the concepts by which we experience and make sense of our interactions in the world.

Intentionality means identifying descriptions under which conceptualisations of the world are presented and which we construct out of subjective experience. And it is intentional

understanding which determines the phenomenological nature of this research project in that it is *meaning* (and personal motivation) which forms its central subject matter and involves looking at the public language of appearance.

However, in saying that the research is phenomenological in nature we distance this from certain branches of phenomenology and associated methods of analysis.<sup>6</sup> This refers in particular to phenomenography which firstly attempts to start without a particular view or hypothesis and, secondly, assumes that the researcher can be a wholly detached and impartial observer, able to discount all preconceptions. The first feature is shared in particular with ethnography, a qualitative approach which also relies on detailed observation but which is not fundamental to case studies. In other words, we are looking at a qualitative case study applied to a particular phenomenological research orientation which will be distinguished by its analytical method.

To begin with, Yin (1994) differentiates between descriptive, explanatory and exploratory case studies. A descriptive case study formulates constructs to organise data and relate to other research findings and themes which identify the important features of a case. Robson (1993) sees the purpose of descriptive research as giving a profile of the case study subject which requires in-depth knowledge of the research subject to enable the identification of aspects on which to gather information. This does not mean that the researcher describes everything but, as Yin maintains, places a responsibility on the researcher to be selective in order to focus on the aim of the study. For exploratory case studies Yin uses the analogy of exploration to suggest that rationale and direction based on initial assumptions, even if proved wrong later, should underpin exploratory case studies.

Whilst Yin defines case study in terms of the process involved in carrying out the research and the unit of analysis, others turn to the significance of defining the unit of

---

<sup>6</sup> Phenomenology starts with Husserl's attack on psychologism (the attempt to absorb logic into empirical psychology) in *Logische Untersuchungen*, 1900-1901. Referred to as descriptive phenomenology in its approach to objects and objects as encountered, this is the source of four main tributaries of phenomenology (1) Realistic phenomenology places emphasis on the pursuit of universal essences of human actions, motives and self. In this vein the philosophy of law (Reinach) and ethics (Scheler) became subjects of study (2) Constitutive phenomenology, triggered again by Husserl (*Ideen zu einer reinen Phenomenologie und Phenomenologischen Philosophie* 1, 1913) concentrates on phenomenological method; in particular the method which involves temporarily discarding all our preconceptions of conscious life as something that exists in the world, and is done with the aim of obtaining an essential inter-subjective basis for the world (3) Topics such as action, conflict, desire and death are covered by existential phenomenology. Amongst its exponents, Merleau-Ponty used Gestalt psychology to describe perception and Sartre colonised the topics of freedom and literature (4) And developing the method set out in Heidegger's *Being and Time* (1927) which proposes that human existence is interpretative, hermeneutical phenomenology addresses the method of interpretation. For Heidegger appearances are phenomena and phenomenology examines the disclosure of a thing in appearance and not the appearance itself.

study. For Merriam (1988) if no boundaries are set upon the phenomenon under study then it is not a case.<sup>7</sup>

Following an interpretive model of case study<sup>8</sup>, Gall (1966) identifies three ways of analysing data: interpretational, structural and reflective. The first of these involves a process of scrutinising data in order to find patterns, themes or constructs. Analysis starts with the development of categories to bring together the data; each category being representative of a particular type of phenomenon. In structural analysis, data are examined to identify patterns in conversational text, events or other phenomena and, in contrast to interpretational analysis, the researcher is not required to superimpose meaning on the data.

Applying to this exploratory case study, reflective analysis acknowledges that data can be described based on the researcher's initial speculation rather than as a result of categorisation.<sup>9</sup> The counterpart of this approach is to be found in phenomenographic analysis which aims to develop categories of description for the different ways in which a thing is understood; those categories being regarded as a map of the 'collective mind'.<sup>10</sup>

In phenomenography, data are gathered into bundles, each bundle comprising elements (utterances) which show a unique facet of the phenomenon. These bundles of data are studied on the basis of their internal consistency and the relations between them. Put another way, categories (data constructions) are composed by the researcher in order to explore the ability of the data to explain its full range of variations.

However, there is a difficulty in that the meanings given to subjects' statements cannot be taken as meaning bearing unless their elements have been identified against the background of all meanings in the research. The criticism which follows is that it is not always clear whether subjects' statements obtain their meaning in relation to the

---

<sup>7</sup> One way for judging 'boundedness' is to see if there is a limit to the number of people who could be interviewed or observations which could be made.

<sup>8</sup> Case study can be applied to interpretive, positivist and critical research orientations. Interpretive researchers work from the basis that access to reality is gained through language, consciousness and shared meaning. For positivists like Yin (1994), knowledge of reality is objectively given and can be described by measurable properties which are independent of the researcher. Merriam (1998) identifies critical research as an ideological critique of power and oppression often directed to influence policy change. It starts from the assumption that social reality is a historical concept that can be constructed and reconstructed. Critical research looks at the conflict to be found in society and is ideological in that it has a mission to help society rid the causes of oppression and alienation.

<sup>9</sup> As such, 'conclusions' are an inappropriate term for the end result of the study because the reflective approach allows greater freedom for research interpretation and evaluation which is not limited by the requirement to categorise data.

<sup>10</sup> That there is no consensus on what categories of description are and what they actually show is no different from the divergent views regarding the findings of qualitative research generally.

research as it unfolds or whether they emerge from preconceived ideas. Meanings may be given by the researcher through personal bias and through the researcher's manipulation of the interview which Miller and Dingwall (1997) distinguish from conversation.

An interview is a specific occasion for discussing a subject that is of interest to the interviewer but may not be of interest to the interviewee. As such, the interviewee, whether interested in the subject or not, wants to come out of the interview having shown his or her proficiency as a member of the community which the interviewer calls upon. The result is that interview data become social constructs produced by the interviewee and the reactions and prompts of the interviewer regarding the acceptance or not of what is being said. This is discussed in relation to all types of interview which is contrasted with observation by saying that 'interviewers construct data and observers find it'. Miller and Dingwall do not dismiss interviews totally. Obviously it depends on what the researcher is after; some phenomena cannot be observed directly by the researcher. However, the point which they do not acknowledge is that in both interviews and conversations we direct our attention to something and talk *about* it, even if this is limited to asking a question in the expectation of being answered by either 'yes' or 'no'.

On Miller and Dingwall's account phenomenographic analysis would have to extend to exploring how far categorised statements have been influenced by 'production relations' which may change the original subjective meaning they carried. If not, the validity of phenomenographic research is open to the criticism that the researcher categorises only on the basis of a hunch and that a statement about something really does say something about the phenomenon. Consequently, the research analysis is said to suffer because of the perspective adopted through the researcher's own concepts. However, this criticism and its supporting arguments are diluted if one accepts that:

- speculation (a hunch, hypothesis or intuition) is the starting point of any exploration
- it is not possible to avoid some level of personal influence in the research since the researcher unavoidably uses himself or herself as an instrument of his or her own research; that is, it is not possible to start with a 'blank sheet' and, related to this,
- it is not the researcher's objectivity which is the issue but the researcher's *claim* to objectivity.

Having highlighted the problems associated with the objectives of phenomenographic analysis, research validity and reliability require different emphases. Those working in the positivist tradition may consider that as an analytic method reflective analysis does not meet objectivity as a criterion of validity. Yet the approach does allow readers and colleagues to see the researcher's perspective and determine how it compares with



their own, so long as opportunities are given for others to give comment during the course of the research. In that sense reliability becomes more a function of the credibility and authority of the researcher's knowledge claims and role in the research. This is compatible with Stake (1995) who, in countering a common criticism of case studies as not producing generalisable findings, argues for an approach based on a close relationship between readers' experiences and the case study. Data generated by case studies react with the personal experience of readers which enables a more thorough understanding of the phenomenon. In other words, the researcher is able to use his own knowledge of the community in which he or she operates to interpret data rather than analysing this interpretation on a solely procedural basis.

This returns us to intentional understanding and to be reminded that Husserl, with whom phenomenology began, abandoned his initial enterprise of developing a methodology which is purely descriptive and without preconception or presupposition in favour of looking to meaning as always involved in the 'lived world' or *Lebenswelt*: a concept which locates consciousness in the body, history and social world.<sup>11</sup> Intentional understanding 'tries not so much to explain the world as to be at home in it' (Scruton, 1990: p. 108).

Our research approach and its justification, therefore, is defined as phenomenological in that if phenomenology is the practise of studying the *Lebenswelt* through the perception of individuals and does not seek to detach the researcher from the world of appearances which he or she is a part, then it is possible for the researcher to compare his or her understanding of reality with that of others through concepts which the researcher puts forward but which, nevertheless, may still be incomplete or rejected by others as inappropriate. This has influenced the case study strategy and composition.

### **Case study composition, validation and chapter outlines**

The summary mentioned that this paper is composed of a series of papers that were written as the case study proceeded. These papers were published electronically on CEDR's website comprising an introductory paper, a theory level paper which discussed conceptual components, followed by two further papers (described as research level papers) which began to locate the conceptual components within the case.

The issue of objectivity (being value-free) has the same poignancy in research as it does in the field of mediation. Having said that the phenomenological nature of the research is determined by our focus on meaning and personal motivation and that the subjective experience of research participants extends to the researcher through

---

<sup>11</sup> *Phenomenology, which stresses the conscious form of meaning, should be contrasted with psychoanalysis which strives to grasp subconscious desires. There is also a contrast in Marxist analysis and social theories which rank the individual second to the social and historic factors of one's time.*

reflective analysis in which data are described through the researcher's concepts and speculation, it presents a challenge to the idea that validity is met through techniques such as data or investigator triangulation when they are included as part of the research design. The point is that whilst these techniques suggest objectivity, what we produce through our research is something socially constructed.

Qualitative research strives:

*'not to produce knowledge of the social world as an entity but to engage in knowledge making as a human activity. This is fundamentally a normative undertaking. It requires that we come to terms with a sense of moral purpose and responsibility in human inquiry'* (Schwandt, 1993: p.19).

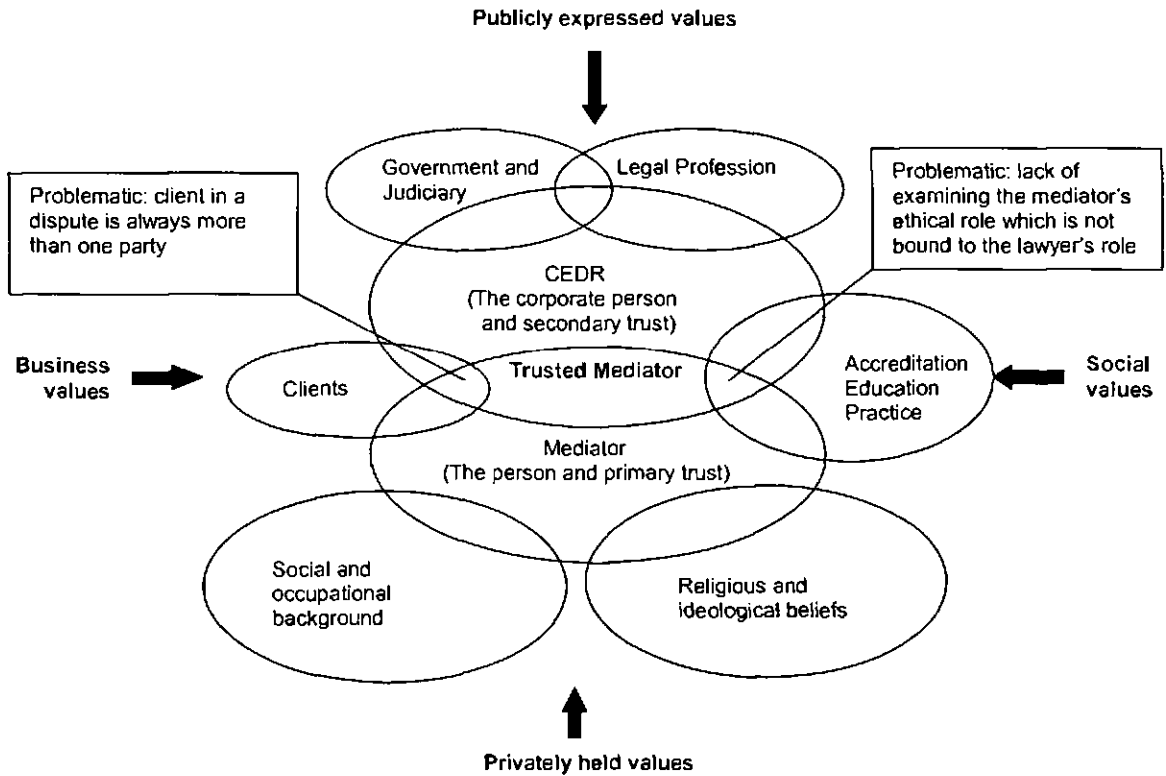
This places an obligation on qualitative researchers to investigate their selves at the same time as they are investigating others (Berg and Smith, 1988).

Following Lincoln and Guba (1985), we prefer to speak of trustworthiness rather than validity in qualitative research. But, like Smith (1998), we do not take Lincoln and Guba's criteria for research as credibility, transferability, dependability, and confirmability; rather reflexivity, transparency, moral reasoning and persuasiveness.

So to defend our reflective analytical approach, and to step outside the argument that such analysis does not meet objectivity as a criterion of research validity, we must ensure that research participants have the opportunity to compare their perspectives with that of the researcher. It is for that reason that all papers written at the time were sent to interviewees before their interviews took place.

The initial theory level paper (Chapter 3 here) pre-empted the document research and interviews with mediators as part of the fieldwork. Analogous to a theory building structure described by Yin (1994), each paper was seen as a chapter engaging and illustrating a new theme in the development of the interpretation.

The themes and the conceptual territory covered are shown diagrammatically in Figure 1. It shows that the trusted mediator sits at the crossroads of competing values; the general problematic. It also locates two specific problematic situations for the commercial mediator and the mediation service provider. The first is inevitable in that in any dispute there will always be more than one party; the client, therefore, is complex. Second, at this stage in the development of commercial mediation, the mediator's ethical role itself needs to be examined and developed in a way that is not reliant upon or bound by the lawyer's role.



**Fig 1. The trusted mediator: the problem of reconciling competing values**

This paper covers the same territory but the order of chapters and components within the chapters does not reflect the order in which the individual papers were written and made public since the case study involved the search for a conceptual approach to make sense of a changing context. This has resulted in a small but important change to the original title of the paper from *The Trusted Mediator: developing a framework for practitioner ethics in the occupation of commercial mediation* to *The Trusted Mediator: developing an ethical framework for the professionalisation of commercial mediation*. The change reflects emphasis on how practitioners locate themselves ethically in an occupation that is being professionalised and how they might work in the future rather than ethics in their practice.

This runs in tandem with the point that the accelerating development of the occupation of commercial mediation coupled with the fact that this project was carried out by a single researcher did not make it possible to interview (as one of the data collection methods) a large number of commercial mediators. However, the aim was not statistical validity involving many participants where persuasive inference is dependant upon factors that can be identified in more than one participant. Instead, the aim was for qualitative validity in *phenomenological research* which focuses on factors and their impact on individual participants. Greater emphasis was placed on collecting in-depth

information from a small number of participants. As a consequence we must be mindful in suggesting the level of those factors present in the group from which participants are taken. And we must also underline that the focus of the case study was CEDR and that the outcome of the research should be interpreted specifically in the context of that organisation.

The chapters, then, progress as follows:

**Chapter 2** examines the values of commercial mediation as seen by government and the legal profession which involves a brief chronological account of the development of commercial mediation and a review of market trends and responses to its development together with the ethical undercurrents which accompany the professionalising of mediation.

The main points in this chapter are grounded by references (in text boxes listed as figures) to CEDR's re-branding project and associated research, the outcome of which was to split CEDR into two defined brands: CEDR, concerning itself with the promotion of the growth of the market, training, research and development activities and CEDR Solve, the practice arm of CEDR, concerning itself with driving market share and its own standard of practice.

**Chapter 3** looks at the nature of discussion on professions and the ethical role and status of professionals. It introduces virtue ethics as an ethical approach and the concept of social capital, a key element of which is trust.

**Chapter 4** takes a more detailed look at trust which has been conceived in many ways; as a form of interpersonal relations, as anticipated good will, as a character trait, as a social resource and others. Trust is also often described in the sense of a medium in which interpersonal relationships take place; hence expressions like a 'climate of trust' or 'atmosphere of trust'. So there appears to be a choice as to how one thinks of trust and the meanings attributed to the concept.

As an abstract concept, trust is not possible to observe. Its existence and boundaries, however, can be inferred by identifying its linguistic characteristics. These characteristics indicate the fact that they reflect different empirical aspects. Observational categories, therefore, can be determined by looking at how we use the term trust.

Virtue ethics is highlighted regarding its relevance to trust and moral motivation.

**Chapter 5** begins with summarising the theoretical framework as it has unfolded in the previous chapters and then goes on to set out our conceptualisation of values and analytic strategy for interviews with CEDR mediators.

**Chapter 6** returns to commercial mediation and looks at what a small group of 'key player' commercial mediators are saying about their own motivation, roles and sense of responsibility and how congruent their values are with those expressed by government.

**Chapter 7** draws on the value components discussed in Chapters 2 and 6 within the conceptual framework developed in chapters 3 and 4 for the trusted mediator. A line is drawn between being a professional by means of belonging to a professional body and being professional. The former does not necessarily secure the latter and the latter is not something that can be brought about by regulation. The distinction between being professional and being a professional is used to give an ethical framework for policy implications regarding the professionalisation of commercial mediation.<sup>12</sup> A final section briefly lists the continuing work derived from this case study.

---

<sup>12</sup> *For, as yet, a non- institutionalised occupational group.*

## 2 TRANSFORMING THE CIVIL JUSTICE SYSTEM

### **Milestones in the development of commercial mediation**

Although commercial mediation has to a large extent developed independently of other key mediation areas, it cannot be looked at in isolation. This is because of the legal profession's, the government's and the judiciary's interests in what can be called the mediation movement as a whole and because the effectiveness of all key mediation areas has been linked to the effectiveness of the Civil Justice System.

The integration of mediation into the Civil Justice System in England and Wales progressed significantly in the mid 1990s. Government figures showed that spending on Civil and family legal aid had increased from £586m in 1992-1993 to £783m in 1997-1998. The increase in expenditure in that five year period was 35 per cent compared with an overall inflation figure of 13 per cent. Also, the number of people who received help under the Legal Aid system had decreased which meant that the rise in expenditure was accounted for by an increase in the cost of each individual case.

This prompted the Government to look at ADR (Alternative Dispute Resolution) to reduce court congestion which included examining the claimed advantages of mediation<sup>13</sup> over litigation; lower cost, user satisfaction, settlement rates, the durability of agreement and the preservation of relationships.

In 1995 Lord Woolf published his report, *Access to Justice* to the Lord Chancellor. The report addressed the concerns dealing with the processes leading to Court decisions rather than the decisions themselves.<sup>14</sup> The three key problem areas which were identified were cost, delay and complexity. These were seen to arise from 'the uncontrolled nature of the litigation process' (Woolf, 1995: p.3) an aspect of which derived from the lack of judicial responsibility for the management of cases and oversight of administration of the civil courts. Without judicial control, the process of litigation, which by nature is adversarial, would be subverted by encouraging an adversarial culture and a culture of delay in which no rules applied.

Lord Woolf envisaged a new 'litigation landscape' where starting court proceedings to resolve disputes would be a last resort after using other more appropriate means if available. It was also clear that Lord Woolf's reforms were intended to curb the worst

---

<sup>13</sup> ADR has become synonymous with mediation and the terms are often used interchangeably.

<sup>14</sup> A concern addressed on many occasions. The last significant report on the civil justice system was the *Civil Justice Review* in 1985.

excesses of litigation practice by having a direct impact on the income of litigation lawyers.<sup>15</sup>

ADR was acknowledged as having the benefit of saving court time and resources and provided benefits for the disputants too. Reference was made to the use of mediation as a mechanism to prevent the escalation of disputes prior to legal proceedings and also to assist the settlement of disputes without the need of going to trial or, if no settlement is reached, is able to narrow the issues in dispute.

Lawyers were urged to take responsibility for familiarising themselves and their clients with ADR options. This was reinforced by a recommendation that at every case management conference and pre-trial review the parties would be required to say whether they had considered ADR and if not, why not.

Whatever the benefits, mandatory ADR as a precursor to litigation proceedings or wholly as an alternative to litigation was not proposed as this could be seen as an erosion of a person's entitlement to apply to the Courts in circumstances where private rights or duties by a public body had been breached.

Monitoring and evaluation were also thought to be required. The high success rates claimed by mediation practitioners were considered to be based on too few numbers of cases which did not give sufficient indication of the 'permanence of mediated settlements' (Woolf, 1995: p. 146). The low number of mediation cases was linked to the lack of availability of legal aid for civil litigation cases. Although outside his remit, Lord Woolf considered that the Legal Aid Board could authorise the use of ADR under the terms of the legal aid certificate in pilot schemes. In a similar vein, the use of an ADR scheme, if one was in place, could be taken into account when the grant of legal aid was being considered.

The problems which Lord Woolf highlighted in the old litigation system were that it was:

- too expensive; costs would often exceed the value of the claim
- ponderous in bringing a case to a conclusion
- lacking equality in terms of those who were wealthy enough to pursue litigation and those who were not
- lacking certainty in relation to time and cost
- incomprehensible to many litigants
- fragmented due to no clear overall responsibility for the administration of civil justice

---

<sup>15</sup> 'A system that in many smaller cases pays more to the litigator than it does in compensation to the litigant is unacceptable' (Woolf, 1995: p.10) and 'Delay is of more benefit to legal advisors than to parties. It allows

- too adversarial; cases were run by the parties not by the courts with rules often ignored by the parties and not enforced by the courts.

To overcome these problems Lord Woolf put forward a procedural change involving a number of key features. One of these was the encouragement of the use of ADR which was considered to be an aspect of active case management.<sup>16</sup> However, judges would have to be convinced that those calling themselves mediators could, in fact, mediate:

*'...there are two ways in which ADR can really take hold. One is because the litigation system is so appalling that you have to find some alternative to litigation; people unwillingly are forced into ADR. The other is a culture developing where people seek to resolve disputes reasonably, and that is a much better culture for ADR to work, and I believe that the information that we have been having is producing an atmosphere within the dispute resolution industry which will enable ADR really to work well...ADR will only work well, and I want it to work well, if mediators are up to the job. There is nothing going to turn people off from ADR more quickly than if they have mediators who do not know what is involved in conducting a mediation properly ...it is also critical that in fact, those who take on the job of mediating know what they are doing. And we must police the mediation scene so those who can be described as cowboys do not find the opportunity to destroy the very good work which is being done by others'* (Lord Woolf, CEDR Civil Justice Audit 7 April 2000: transcript p. 13).<sup>17</sup>

Driven by Lord Woolf's report, a court-annexed mediation pilot scheme for civil disputes was initiated by the Central London County Court in May 1996. The aim was to provide an informal way of settling disputes after court proceedings had begun.<sup>18</sup>

---

litigators to carry excessive caseloads'. (Woolf, 1995: p. 12)

<sup>16</sup> The other key features included:

- pre-action protocols to provide a clear procedural structure for both claimant and defendant and to resolve or clarify the nature of the dispute prior to the issue of a claim
- Part 36 offers to enable claimants as well as defendants to make offers to settle
- single joint experts to promote a co-operative approach between the parties as well as reducing costs
- a case management system where defended cases would be allocated one of three tracks by the court based primarily on claim value; small claims track for personal injury cases, fast track and multi-track cases
- a single set of rules for the high court and county courts

<sup>17</sup> But what is the character of conducting a mediation properly? Does its emphasis lie in legal knowledge, case knowledge or knowledge of how people behave and respond?

<sup>18</sup> Run over two years, the pilot scheme dealt with claim values of between £3000 and £10,000. The scheme was voluntary and was offered once the proceedings had started. Each party paid a nominal sum towards the mediator's fee and mediations were arranged within 28 days. Time limited mediations of three hours took place in the court building outside normal court hours.



The evaluation report on the pilot scheme which was published in 1998, revealed that despite the low numbers of those who participated in the scheme, most found that mediation was preferable to going to court and a satisfactory way of settling disputes. Settlements were achieved in 62 per cent of mediations and another 18 per cent of cases settled shortly after the mediation. Not surprisingly, scepticism about mediation was more likely to come from those whose cases had not achieved settlement and the frustration that the attempt to reach an agreement had failed. Complaints generally fell into the category of those who felt under pressure to settle or that not enough pressure had been exerted by the mediator on the other party.

In most of the pilot mediations lawyers accompanied their clients. Most of these lawyers had no previous experience of mediation and found that the role they were expected to perform was very different to that in a court hearing. Preparing for a mediation was likened to the preparation required for negotiation at settlement meetings between solicitors before trial. Lawyers were encouraged by the speed and informality of mediation and thought that it could save their clients' legal costs. They also acknowledged the contribution of mediators in achieving agreement. Most parties and their lawyers trusted their mediator and considered that the mediator was neutral and unbiased. Mediators were reported to have 'good personal skills and be experienced and knowledgeable about the law as well as having an understanding of the facts in the particular case being mediated' (Genn,1998: p.49).

The Central London County Court scheme was put on a permanent footing in 1998.

On another front, in 1996 Section 29 of the Family Law Act 1996 made legal aid available for mediation for the first time. As a result, parties were eligible to receive legal aid for their divorce only after a meeting with a Legal Aid Board franchised mediator to assess their suitability for mediation. Mandatory mediation under section 29, however, was not received with universal enthusiasm. A report produced by Bristol University in early 2001 revealed that most cases referred to mandatory mediation found solicitors' advice more helpful than mediation. The chairman of the Law Society's Family Law Committee was reported as saying that the Lord Chancellor saw the use of mediation as no more than a cost-cutting exercise and that:

*'The whole Section 29 procedure-which triggers compulsory mediation-is wrong. It has also been assumed that solicitors shouldn't be involved in mediation, which is why it has not been working in family cases. If solicitors could be encouraged to be involved, I think it would be more widely used' (Gazette: Weekly Journal of the Law Society, 19 July 2001 pp. 22-23).*

In October 1998 the Legal Aid Board announced that public funding should, in principle, be available for mediation. This was followed in December by the Government's White Paper, *Modernising Justice* which set out the aims and objectives of proposed reforms including consideration of how different types of ADR could contribute to making the civil justice system more fair and effective.

With the coming into force of the new *Civil Procedure Rules* in April 1999, Lord Woolf's aim of making ADR an integral part of the justice system was put into effect. Judges were now able to order parties to attempt mediation and impose cost sanctions on parties who unreasonably refused to try ADR. As many have recognised, this power is one that the courts, litigants and the legal profession must take into serious account:

*'The judiciary will have a significant part to play in breaking down the preconception that only a full-blown court hearing can really right a wrong'*  
(Genn, 1999: p.59 quoting the Lord Chancellor).

One year later the Access to Justice Act 1999 came into force in which the Legal Services Commission was given the power to refuse funding in cases where ADR or litigation funding was available to the applicant.

In May 2000 the Lord Chancellor's Department published its report summarising the responses to its discussion paper on ADR.<sup>19</sup> Once again both the qualitative and cost benefits of mediation were highlighted<sup>20</sup> which no doubt served to increase one sceptical lawyer's antagonism towards the Lord Chancellor's Department's favourable publicity of mediation quoted in the report:

*'It is as if the Department of Health were to issue leaflets advocating the use of aromatherapy'*. (Lord Chancellor's Department, 2000: p.3).

Respondents thought that mediation was suitable for cases where no acknowledgement of distress by one party to another had yet been given and was a significant factor in the claimant's grievance against the defendant. Mediation was also thought to be suitable where a cost effective resolution was wanted coupled with the least possible stress, and for multi-party disputes.

---

<sup>19</sup> Respondents to the discussion paper were predominantly composed of legal professionals including the professional bodies of the Law Society, the Bar Council, ADR service providers and the judiciary.

<sup>20</sup> The list included the rebuilding or preservation of relationships between disputants, privacy and confidentiality, informality, the reduction in stress and the cathartic effect, a forum for disputants to express themselves in their own way, ownership of the dispute and thereby having greater control of the dispute, and increased client involvement in the process compared to litigation.

Cases where parties are not represented, involve complex medical issues, where parties are not willing to commit to the process or where a summary judgement is available were not thought to be appropriate for mediation. Concerns were also expressed in relation to parties participating in mediation for the wrong reasons. A party engaging in mediation could do so to test the strength of their case or simply use the process as a delaying tactic. One party could also end up with 'less than their legal due.'

The report stated that some respondents did not consider ADR would be unsuitable for public policy reasons with others commenting that parties are not bound by any duty to bring cases to court for the benefit of the public at large. Generally, it was thought that the development of the law would not be hindered by the increased use of ADR,

As to the role of Government in the provision of ADR, comments ranged from those who thought limited involvement was necessary through education and quality control, to those who suggested that the Government should provide ADR services or mediators should be provided by the state. Many thought that ADR should be guided by market forces but subject to the need for quality control. But leaving the development of ADR in the hands of market forces was also seen to have negative consequences; slow change, variable quality and take-over by lawyers were given as points of concern. Also, some litigants could be denied access to ADR because of commercial rates. This last concern emerged later in a letter published to the Law Society. One lawyer said that ADR is centred around large value complex cases which brings mediation and other dispute resolution processes out of the reach of high street solicitors.

*'Indeed, ADR and, especially mediation, are not particularly suited to high street work - and the first choice of most high street solicitors and their clients will remain litigation. I think it is unlikely that the high street can assist with the dispute resolution revolution' (Gazette: Weekly Journal of the Law Society, 12 July 2001 p.18).*

In other words, high value cases attract high commercial rates for mediators and access to mediation is denied to most people because they cannot afford to pay the fees of the mediator.

In terms of quality control, common standards, a code of practice and a disciplinary code for mediators were generally favoured. Some members of the judiciary, however, thought this was still too early. Two thirds of respondents favoured self-regulation but also thought that Government should have a 'foot in the door' through endorsement and intervene if self-regulation failed. An over-arching organisation for family, community

and commercial mediation was seen as the quality control mechanism for self-regulation.<sup>21</sup>

In March 2001 The Lord Chancellor's Department pledged that all government departments would seek to avoid litigation by using mediation and other ADR processes wherever possible. Government departments and agencies would include clauses on ADR in their standard procurement contracts and Central Government would produce procurement guidance on different ADR mechanisms available for Government disputes. One month later, the Lord Chancellor's Department published its report on the emerging findings of the effects of the Civil Procedure Rules<sup>22</sup> and issued a press release announcing the Government's intention to launch a new mediation quality mark for family and community mediation service providers.

### **The commercial mediation market**

Reports from the Lord Chancellor's Department and mediation pilot surveys showed that most people who tried mediation liked it and would use it again. However, this positive reaction to mediation does not appear to have been reflected in any sustained rise in the number of mediations since the introduction of the new Civil Procedure Rules, when the number of mediations more than doubled. For the year 2000-2001 CEDR's figures showed a one per cent rise in mediations compared with the dramatic increase of 141 per cent in the previous year.<sup>23</sup>

The text boxes which now appear (as figures) in this chapter highlight some of the key findings of CEDR's re-branding research. This is firstly because trust is integral to the concept of 'the brand' and also because CEDR, too, is a client in the sense that it (as

---

<sup>21</sup> In 1997 a group of mediators representing the main fields of mediation (family, community and commercial) came together as the Joint Mediator Forum (JMF) to draft common mediation practice standards and to discuss the need, or otherwise, for an umbrella organisation for a nascent mediator profession. By 1999 the JMF thought it inappropriate that this umbrella organisation should regulate and discipline mediators who contravened a common code of conduct and become an institution in the form of established professions. In 2002 the JMF is inactive. Its constituent members, particularly the commercial mediation service providers, focusing more on enhancing and expanding market share.

<sup>22</sup> The key findings of the report indicated that:

- There has been a drop in the number of claims
- Pre-action protocols appeared to be working well to promote settlement before the issue of claims
- 'Steps of the Court' settlements were decreasing and that settlements before the date of the hearing had risen
- There had been a rise in the use of ADR which suggests that parties were more likely to try alternative ways of settling claims
- The use of single joint experts appeared to be working well in the sense that their use made an impact on producing a less adversarial culture, earlier settlement and, possibly, costs
- Case management conferences were making an impact in terms of reducing the complexity of litigation
- The time between issue of claim and hearing for those cases that went to trial had decreased
- The number of appeals in the course of proceedings had dropped significantly
- As to costs, it was too early to say.

<sup>23</sup> Although the small rise in CEDR's mediation numbers in 2000 is a reflection of the sharply distorted figure of the previous year. CEDR's figures, however, are not necessarily a reflection of the market as a whole.

any other ADR service provider) acts as a gateway, routing disputants, their lawyers and mediators into the mediation process.

Despite benefits for business being recognised, commercial mediation is perceived as:

- a sign of compromise and weakness. 'People giving up' versus I've got a good case to win' (In-house lawyer)
- not having a strong basis for business; mediation still requires context for discussion to be put on the business agenda:

*'You have to be an evangelist for the cause within your organisation otherwise it doesn't stick.'* (In-house lawyer)

There is also a perception that CEDR is too focused on the legal and political establishment in the UK and should look more globally, particularly where client organisations are global corporations and are not restricted to one legal jurisdiction.

Fig 2. CEDR re-branding: perceptions of commercial mediation and CEDR

It may be that whilst the legal profession is being encouraged by the judiciary to try mediation, it is those solicitors firms dealing with higher value cases in London who are more likely to suggest mediation to their clients. These same firms have probably had partners and senior associates who have undergone mediator training, have championed mediation in their firms and who also wish to be put forward as mediators for cases by service providers. We should also recognise that the Government's support of mediation owes more to its concern for escalating litigation costs and the influence of individual pioneers from within the legal profession than any cohesive organisation of mediators. Full-time mediators, whether they are lawyers or not, are rare.

CEDR operates in a sector lacking definition. It competes with both individual mediators and law firms. Law firms provide cases and supply mediators. Law firms also act as gatekeepers to mediation, retaining control of the client relationship, and often prefer to appoint individual mediators directly. Whilst businesses are the end clients they, too, supply mediators. Individual mediators are seen as the only 'practice brands'. As such, mediation organisations are seen as largely unnecessary. But there is a weakness for potential clients operating in a network made up of many individuals.

Most of those trained as mediators are full-time practitioners in other occupations, principally law. CEDR accreditation is highly valued and recognised but at the same time, the practice of mediation is not seen as a principal source of income or as the foundation to a career: more a semi-retirement role with emphasis placed on individual mediators.

Fig 3. CEDR re-branding: lack of sector definition

Another aspect, related to the proportionately low but, nevertheless, steadily increasing number of court-referred mediations, is that judges are not confident that mediators have, as yet, enough training and experience.<sup>24</sup> A contrary view is that more judges need to be familiar with ADR.<sup>25</sup>

However, the slower rate of increase in the number of mediations must be put in the context of the culture change which the Civil Procedure Rules were intended to drive. A culture change and paradigm shift does not occur overnight. Coupled with an optimistic expectation, the small percentage of commercial mediators who are considered to be highly experienced practitioners in a market occupied by more mediators than available mediations has prompted resistance to external regulation and reliance, instead, on the market (clients) to decide which mediators and service providers can be trusted.<sup>26</sup>

Those who are aware of CEDR see it as *the* mediation organisation which operates beyond commercial goals; although some find CEDR's charity status and its associated social values incongruent with the business environment to which it must appeal and operate in. CEDR's impartiality and independence is highly valued together, again, with its mediator accreditation. The problem is CEDR is not seen as a service provider. It cannot rest on its 'academic laurels'. Moreover, CEDR has received criticism of its mediator relations. As one in-house lawyer put it:

*'It turns out mediators but then leaves them to sort themselves out'*

Amongst other factors in the branding of CEDR Solve such as raising service standards and remuneration, CEDR Solve will require a clearer relationship with the mediators with which it wishes to work.

Fig 4. CEDR re-branding: tension in perceived CEDR values

Commercial mediation services brought to an increasingly sophisticated market may have little need for external regulation when clients themselves are able to come to their own decisions about the quality of mediators. This is different to family and community mediation services, for example, which are currently provided more widely. In this case the Government, through the Community Legal Service, has introduced the quality mediation mark in an attempt to ensure that service provision is set within a structure where service providers take responsibility for the quality of their service.<sup>27</sup>

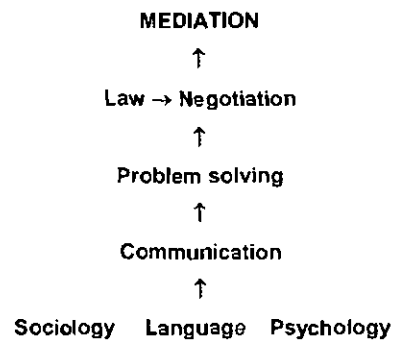
<sup>24</sup> See *Gazette: Weekly Journal of the Law Society*. 19 July 2000, p.23.

<sup>25</sup> A point that the Judicial Studies Board is addressing.

<sup>26</sup> See 'The men from the boys' p.37 *The Lawyer*. 10 Sept 2001

<sup>27</sup> There have been discussions for some time over whether a general kite mark standard of quality and ethics is needed for all mediation provision but these discussions have been stymied by the difficulty of identifying an appropriate administrative body. See also footnote 21.

Another reason that external regulation is problematic is associated with the difficulty in dealing with a developing cross-disciplinary area of knowledge. Mediation is a derivative discipline (Fig 2). Language, sociology, and psychology are brought together to develop theories of communication. In turn communication theories overlap with problem solving and negotiation theories that are associated with law.<sup>28</sup>



**Fig 5. The cross-disciplinary architecture of mediation**

If we take it that the term profession involves work that applies a defined body of knowledge and study and also involves judgement as to how aspects of that body of knowledge should be applied in practice, then the client will need to have some degree of trust in the professional’s judgement. The difficulty with external regulation at this stage of mediation development is that we do not yet know what it is that is to be regulated. What is it that we are insisting mediators know?

Mediation’s core skill is seen to centre on facilitation not hard professional expertise: process skills versus technical specialism.

**Fig 6. CEDR re-branding: mediation and professional expertise**

Nevertheless, some service providers and mediators have said that external rules should be imposed on mediation practice; possibly more an attempt to establish status rather than professionalised work or a response to client demand for safety and certainty.

**Mediation as the practice of law or ADR?**

One of the points made in the preamble to CEDR’s response to the Lord Chancellor’s Department’s discussion paper on ADR was that:

<sup>28</sup> A model put forward by Professor John Wade, School of Law, Bond University, Australia in an informal visit to CEDR in 2000.

*'Mediation is inherently a low-risk professional and client activity. Except in cases of exceptional abuse, parties are regularly advised that any outcome has to be agreed by them. Advisers and arbitrators hold a much more powerful professional position. Also parties are more easily induced into a professional relationship with an adviser than into a mediation which needs at least two parties to initiate' ( CEDR, 2000: p.2)*

If the practice of mediation is seen as a lower risk activity than the practice of law then this assessment turns on the point that in mediation the offering of professional advice is absent. Mediators are seen as 'process designers' and 'process managers' who do not offer advice in the same way as a lawyer offers advice which is left for their clients to act upon or not. But there is more to add here.

Some sceptical lawyers have given credence to mediation so long as strong associations with law practice can be applied. This is typified by Simmons ('Mediators offer little value'. The Lawyer. 13 Mar. 2000 p.33) who has argued that lawyers have the ability to negotiate between themselves, their clients and other parties without the need of a mediator. She says that achieving compromise is as much the role of the lawyer as progressing a case towards resolution by a judicial decision. Compromise is achieved by negotiation which is within the capabilities of lawyers.

In a mediation the client may communicate something to the mediator which has not been revealed to the lawyer. She asks why the client should trust the mediator but not the lawyer who will hear what has been disclosed during the mediation. There are two possibilities: that the client is not aware of the role the lawyer can play in settlement negotiations and that the mediator is better at getting information out of the client than the lawyer. If that is the case, why? Simmons also says that in the sphere of commercial activity negotiations frequently take place and without mediators. This again turns on the point of trust. She wonders how all parties in a dispute can put their trust in a third party (the mediator) and disclose confidential information which they would not disclose to the other parties. In another forum the third party would be faced with a conflict of interest which would exclude him or her from participation.



After over ten years of promoting the practice of commercial mediation, training mediators and conducting mediations in the commercial environment, CEDR's need for re-branding was summed up as:

*'CEDR are locked into a legal world view. They need to get higher up the food chain' (potential client)*

This comment referred to the response CEDR must make in both increasing its own market share of mediations and increasing the promotion of mediation directly to businesses rather than through businesses' lawyers.

Having determined two brands, one for CEDR's promotional activities and another for its dispute resolution services (now called CEDR Solve), the branding research continued with attempting to define an identity and name for CEDR's services arm. However, CEDR and CEDR Solve are not two physically separate organisations, they are made up of the same people working in the same location.

What was CEDR asking clients to trust?

The approach involved exploring three short-listed names and their associated characteristics and orientations derived from (1) what the service arm does, (2) how it does it and (3) who it is.

The accompanying characteristics and competing values associated under each were:

- For (1) business-like, a call to action, emphasis on scope of knowledge and techniques. But too result focused, lacking humility, steadfast but too inflexible.
- For (2) mindset and process that can make a difference, unlocks a solution, helps the parties find inspired ways of moving forward, lateral thinking and sensitivity, exploring every avenue, flexible and open-minded. Inspiring to mediators because of the personal qualities required. But too process focused; clients buy results not process.
- For (3) (which most CEDR employees felt comfortable with) UK and international credentials, conflict resolution at the highest level, diversity of mediation usage; business and public sector. But too introspective rather than client facing, establishment (judiciary and government) oriented.

The name finally adopted was not one of the short-listed names. That, however, is of secondary importance to CEDR's attempt to reconcile client, mediator and employee values in order to give a picture of its corporate personality which acknowledges both business and social values (or at least tries to acknowledge that they are not necessarily mutually exclusive). This is summed up in its mission statement:

*'CEDR's mission is to encourage and develop mediation and other cost-effective dispute resolution and prevention techniques in commercial and public sector disputes. We are an independent non-profit organisation supported by multinational business and leading professional bodies.'*

Integrity, impartiality, practicality, bravery and creativity were established as the core values as part of the final brand template.

Fig 7. CEDR re-branding: CEDR's corporate personality

Although mediation is emerging as a by-product of legal practice, and is often said to work within the shadow of the law, that is not to say that mediation should be seen as being wrapped up in the practice of law or, put another way, coincides with the activities which lawyers undertake for their clients. The question arises whether lawyers practising mediation see themselves as distinct from non-lawyer mediators or whether lawyers practising mediation see themselves with non-lawyers participating in a profession of alternative dispute resolution? <sup>29</sup> More broadly, however, the issues discussed in this chapter clearly relate to the question of the professionalisation of commercial mediation which, in turn, demands an examination of the concept of professionalisation itself.

---

<sup>29</sup> *In the USA debate has been influenced by the associated question of whether evaluative, as opposed to facilitative, mediation is seen to be within the remit of legal practice. In an evaluative mediation the mediator 'reality tests' the parties' positions by asking questions about the strengths and weaknesses of their cases and also offers an opinion on the likely outcome of a determination by a judge or arbitrator. Also, the parties may ask the mediator to offer an opinion on the fair settlement or solution to the case. When this happens the mediator may need to consider, even marginally, the law as it applies to particular aspects of the dispute. Those who consider that this constitutes the practice of law are worried that non-lawyer mediators may put parties in a weak or detrimental position because of giving unreliable or erroneous information. The opposing view is that there are many instances where non-lawyers such as local government officers, architects, human resources managers and jurors, apply the law to a specific situation and give recommendations or opinions without it being seen as the practice of law. (Cooley, 2001)*

### 3 WHAT IS A PROFESSION?

#### **Structure v process**

Typifying the orthodox view of a professional continuum, Wilensky (1964), referring to occupations in the United States, describes the process of professionalisation as a series of five stages. The first stage involves the occupational group being involved in full-time work on a specified set of problems. This may occur due to the formation of a specialised body of knowledge within an existing occupation or profession - the likelihood being that professionalisation is more likely to occur where a fledgling occupation is already connected with a profession - or due to a service ideal where the occupation claims that the service it provides is significant to society.

The second stage includes establishing training, policies and procedures which overlaps with stage three in which a professional association is established to set standards of practice and negotiates amongst other competing occupations and professions.

These stages provide the foundation for the penultimate stage where the occupation strives for public recognition and state support for autonomy in the control of admission, methods of practice and developing curriculum. In the fifth and concluding stage, the occupation will publish a code of ethics.

Elliott (1972), accepting Wilensky's description as a useful resume of the main features attributed to professions, suggests that this is tempered by looking at how the goals and activities of the profession are affected by each stage in the process. This is because the activities and goals of the occupation may be subject to change as well as the structure of the occupation.

Similarly, Greenwood (1957) identifies five essential characteristics of the ideal profession which comprise of a theoretical body of knowledge, authority bestowed by its clients, community sanction which enables control of entry and training, a code of ethics and, finally, a professional culture, the principal feature of which is the promotion of the value of service towards a social good.

Newton (1983) reduces the number of attributes most usually associated with professions. These are limited to competence in a specialised area of knowledge, a pledge to the public good in that area and a pledge by individual professionals to maintain the interests of individuals who seek their professional expertise. This last feature, associated with trust, can give rise to tension with the second feature. For example, the promise of confidentiality may clearly be at odds with the ethics of public

service which is declared by a profession as a whole. The public must be given reassurance that individual professionals will preserve confidentiality so that the public is able to turn to professionals when their services are required. The ability of professionals to command high fees is then given as the 'carrot' for the profession to conform to a code of conduct which constitutes its ethical basis. This conformity to an ethical code is seen to be of benefit to society and maintains the profession's monopoly of practice.

Johnson (1972) criticises the emphasis on process arguing that it deliberately skirts around the problem of definition for a theory of profession. One argument is that in order to discuss the process of professionalisation it is necessary to indicate the direction of the process and the destination towards which an occupation is heading. Confusion is also caused by interweaving the intention of defining attributes with reference to attributes defined in earlier literature.

On the assumption that profession could be 'accomplished' independent of the definitions proposed by sociologists, Dingwall (1976) has also suggested that rather than directing efforts into defining profession, it would be more productive to study individuals engaged in particular occupations and the way they use the term 'profession' during their routine work day. However this has been criticised on the basis that individual members of an occupation cannot avoid individuals' conceptions of profession of other occupations with whom they communicate. Also, the state develops occupational categories and classifies occupations, the criteria of which influence access to a client base, remuneration and status. In other words, interpersonal communication and negotiation is not in itself sufficient to achieve profession, nor does profession result singularly from individuals in occupations working in a way which influences others to treat them as professionals.

Coming at attribute theories from another angle, Freidson (1989) argues that the concept of profession is a folk concept which changes in accordance with who is using it and the end to which it is directed. Whilst many definitions include similar or the same attributes, little agreement is to be found as to which attributes are to be stressed in producing a theory of professions. He criticises the strategy of trying to solve the problem of definition by placing less value on defining attributes of professions and focusing on the process by which occupations claim or achieve professional status. The problem, as Freidson sees it, is that we have no clear direction as to how we can determine when professional status is or is not in place; we would still need characteristics of professional status to do this. No more helpful is the strategy which changes emphasis from an idea of profession being a particular type of occupation to the process of professionalisation. He accepts the view of Johnson (1972), and Vollmer

and Mills (1966) that focusing on professionalisation rather than the attributes of professions still requires us to locate the final destination on the journey of professionalisation. Freidson's insight is to see the problem of definition lying in the attempt to treat profession as a generic rather than a dynamic, historical concept.

As a folk concept, he proposes that the appropriate research strategy is phenomenological in nature. What profession is, therefore, is less important than describing how we determine who are professionals and how they accomplish profession by their activities and actions. So different concepts of profession are put forward depending on the goal of the particular group - government agency, occupational group, the public and so on. Each group would conceive of profession in a way to advance its own political and economic interests. Then the question is which of these viewpoints is more authoritative.

Freidson claims that in order to move on from the folk concept we would need to focus more on developing an all embracing theory of occupations which could be derived from describing the character or phenomenon of profession in each particular case rather than aiming at generalisation. The purpose of such a theory would be to explain the importance of the term 'profession' and to analyse those occupations to which the term has been credited.

Analogous to the comments made by Elliott (1972), Freidson says that our study of each case will need to involve an examination of the extent to which claim or aspiration to profession influences the organisation of the occupation.

On the other hand, Johnson (1984) argues that attributing the term 'profession' to an occupation refers more to a 'strategy of professionalism' than to the acceptance of an autonomous group in the labour market which controls its particular work practices. Contemporary professionalism has more to do with an occupational ideology involving an attempt to establish status than it has to professionalised work. The strategy of professionalism... 'more than anything else, entails a sustained attempt to constitute a privileged relationship with the state...' <sup>30</sup> (Johnson, 1984: p.20)

One of the goals of that strategy is associated with the autonomy and extent of independence from the state which secures monopolistic practice. For Johnson a weakness is exposed in theories which identify the control and use of specialised

---

<sup>30</sup> Here, Johnson applies the term 'professionalisation' to a process which stresses the significance of interaction between state and occupational group. Johnson paints a Marxist picture of the state as an administrative mechanism producing policy out of the choices of those who control it. Alternatively the state can be seen as a system of offices which are distinct from those who occupy them and confer their own decision-making powers and liabilities, or, as Rousseau envisaged, a corporate person similar to a firm which has its own will, liability and goals.

knowledge as a core characteristic of professions. Whilst it is possible to accept that professions do indeed deal with a particular body of knowledge, this does not explain how a profession has come into a position to exercise control over it. An account of specialised knowledge, therefore, would need to involve a description of how control is gained and, thereafter, how it is maintained. Such an account would highlight the role of the state.<sup>31</sup>

Fielding and Portwood (1980) also turn their attention to the state but this time through their concept of 'bureaucratic profession' which addresses those occupations which have reached a stage where a relationship with the state functions to achieve the value-specific aims of the professions and, at the same time, the pragmatic aim of efficient service provision of the state.

The boundaries of the term 'occupation' need some scrutiny too. Often occupation is seen as the principal activity which earns us a living. Occupation, therefore, becomes the conceptual mechanism used to analyse the distribution of income. Here, the type of activity that we undertake and how it is organised is of less interest than the point that occupations differentiate between levels of income. But occupation cannot be restricted to simply pointing to a means of income since if that were so then one could say that one's occupation is earning interest from a building society account. An occupation is a means of deriving a source of income through the performance of certain skills that provide goods or services to the public who, at the same time, acknowledge its value. Occupation, at least as we conceive it, is the undertaking of a particular skill or set of skills within a division of labour but which involves more than the ability to carry out a specialised task.

However, what is yet to be said is that professions are a product of modern, post-industrial society which is characterised by a business economy. This brings into question whether the comparisons between professions and business can only be expressed through the issue of self-interest, and doubts may be raised as to whether professionalisation is a process which, above all else, is to be seen as one of regulatory capture. The point has been picked up by Johnson (1995) who, moving from an emphasis on occupational analysis, says that in modern societies professions and the state carry out both complementary and competing roles in a process or system of ordering and regulation.

---

<sup>31</sup> Furthermore, whilst the layman may bow to the expert knowledge of the professional this does not explain why the layman should trust the professional's competence.

### Difficulties with definition <sup>32</sup>

A common method to attempt to arrive at a definition of the nature of profession is to select some occupations which, with certainty, we can consider as professions - usually, law and medicine - and identify the characteristics which they share to give an ideal model against which other occupations may be compared.

The characteristics which often describe this ideal model are:

- Expertise, the mastery of which is drawn from an ever developing and complex theoretical base which necessarily involves lengthy study and training
- Authoritative advice, which is related to expertise, and which clients follow without knowing why it is good advice
- A social good at which the expertise is directed and which embraces the needs of the individual and the community
- Autonomy in setting standards of practice, the content of education and entry into the profession
- Allegiance expressed through a pledge to follow a code of conduct in which ethical guidance is given in relation to client need, the advancement of practice and fellow professionals.
- Prestige, influence and financial rewards are considered to be greater than in other occupations.

If these attributes define what it is for an occupation to be considered a profession then at a cursory glance it seems possible to examine all occupations to see whether they can be regarded as professions. But why assume that the two occupations of law and medicine are typical professions? Their identified characteristics may point to exceptions rather than essential attributes and there is nothing amongst those attributes or their combination that tell us why they are important. Also, those attributes are unclear in their dimensions; how long an education or training or how elaborate or specialised a body of knowledge? <sup>33</sup>

---

<sup>32</sup> The structure of this section relies heavily on the first chapter in Windt, P., Appleby, P. et al (1989) Ethical Issues in the Professions.

<sup>33</sup> For example, if one of the criteria is a prolonged specialist training in a body of abstract knowledge then a five day accreditation course is unlikely to satisfy that criterion if compared with occupations where training extends to many years.

The attribute approach comes across two obstacles.

Firstly, there is a difference between essential and accidental attributes. That is to say, do all the listed attributes turn an occupation into a profession, or have some of those attributes which have been derived from the model or ideal professions of law and medicine, happened by chance and could be changed or even discounted without changing an occupation's claim to profession? For example, would medicine still be a profession if practitioners lost much of their authority?

The second obstacle lies in confusing descriptive definitions with normative definitions of profession.

A descriptive definition gives attributes that are essential for an occupation to be a profession but does not say anything about what professions ought to be like. Conversely, a normative definition gives us the ideals that professionals *ought* to pursue and realise. But it is not always apparent whether we are meant to consider a descriptive or normative type of definition. When we are told that those in a profession pledge themselves to promoting the well being and interests of their clients, is this given in the sense that a pledge does exist or in the sense that professionals ought to have such a pledge?

In relation to debates about professionalisation, problems can also arise where accidental and essential attributes are not determined; problems which are compounded by a confusion between descriptive and normative claims. So in a claim by an occupation to professional status, do some of the attributes of professions listed give rise to other attributes listed? For example, an occupation which has a theoretical foundation can argue that this actually gives rise to authority and autonomy. Alternatively, it can argue entitlement to it by virtue of having a theoretical foundation. The first claim is descriptive, saying that authority and autonomy directly result from expertise in the context of a social process. The second claim is normative, saying that an occupation with a highly developed body of knowledge and expertise ought to have authority and autonomy.

There are difficulties, therefore, in establishing universal characteristics of a profession. However, that does not mean that we are prevented from looking further into the ethical dimension of professions.<sup>34</sup> Here we are addressing the subject of a distinct or special ethical status which may or may not be attributable to members of professions. The subject may be approached by considering whether there are any occupations - including those commonly regarded as professions - which have a special ethical status.

---

<sup>34</sup> Echoing Freidson (1989), how one decides who professionals are is governed to a great extent by the purpose of our deciding.



If there are none then we are all in the same 'ethical boat'. If, on the other hand, some members of occupations are distinguished by special ethical status then the nature of that status needs to be examined and a question raised as to why it is held. This does not rely on the occupation being a profession and it is possible, therefore, to pursue the ethical topics without having to worry about clear distinctions between those occupations which are professions and those which are not. And if that is not the case, then we are still open to the possibility of trying to see how an occupation could get special ethical status.

Again there is a distinction to be drawn between descriptive and normative issues. From a descriptive point of view, ethical status refers to one's location in the actual system of values that is to be found in one's society and will be influenced by how restricted or expansive a view one intends to put on the term society. From a normative point of view, ethical status refers to the whole framework of values and principles that should inform one's conduct and that should give rise to the judgement of one's character.

Is it possible, then, for different people to have different normative ethical status?<sup>35</sup>  
Before addressing this question we need to comment on ethical roles.

### **Ethical roles**

Identifying the particular function or position of persons is the first of three points which need to be addressed when attempting to define an ethical role. Next, the ethical status of those in the identified role must be found to differ from the ethical status of those not in the role. This means finding some derivative or fundamental value or values that correspond in the same manner to everyone in the identified role but not to anyone not in the role. Finally, the ethical status which is particular to the role must be reliant upon the features which define the role.

---

<sup>35</sup> Three considerations have been employed in arguments against diversity in normative ethical status; universalisability, equality and ethical harmony. The first of these broadly gives that if we make different normative ethical judgements about two situations then we must be capable of identifying some ethically relevant characteristics which are to be found in one but not in the other situation. Essentially this is a requirement for consistency but leaves open the question of what types of differences are to be construed as ethically relevant.

The second consideration, equality, is a generally accepted principle that in a just society the sharing of advantages and disadvantages should be as equitable as possible. Thus if we wanted to say that professionals did in fact have a normative ethical status which was different from that of non-professionals, then it would be necessary for us to show that we are not arguing for some form of inequity that would give rise to an accusation of being unjust.

Thirdly, ethical harmony refers to a widely held view that if we were all in a position to understand our rights and duties then our actions would be congruent with each other. An opposing view would be that our actual rights and obligations can arise under conditions that lead to conflict. So the greater the diversity in ethical status the more prone we are to ethical disharmony.

So are there professional ethical roles? More specifically, are there any occupations, the defining features of which give rise to more discernible ethical roles for any person in one of those occupations?

Responses to this question vary. At one end there are those who argue that professionals are no different to anyone else and, therefore, their conduct and actions should be considered in terms of the same ethical values. At the other end there are those who say that being a professional is so different that the ethical status of professionals is distinct from that of non-professionals. This includes those who claim that entry into a profession should be seen as a submission to a calling which transforms them into people with very different ethical status and places them one rung higher on the 'ethical ladder.'

The middle ground in the arguments of ethical roles of professions centres around derivative-level distinctions between the ethical status of professionals and non-professionals. The main endeavour is to give characteristics that can be employed to substantiate distinct role values taken from the shared core values of other professions and non-professions. Much depends on the fundamental values or theoretical ethical perspective adopted, so we have to give at least a glimpse of the three major approaches to ethical theory together with some of the difficulties which each brings. The approaches have been traditionally classified under the headings of consequentialism, deontology and virtue ethics, although under the last of these approaches the classification is seen to be one of a distinction between duty ethics and agent ethics. For the moment the traditional format and classification is followed in order to suggest a more accessible vantage point from which to look at occupations and the ethical framework in which they operate.

## **FAMILIES OF ETHICAL THEORY AND APPROACHES TO THE PROFESSIONS**

### **Consequentialist approaches: Utilitarianism**

Consequentialist approaches focus on the outcome of consequences of human actions which are judged in accordance with the level of desirable results those actions accomplish. Here, concepts of duty, right and wrong wait upon the concept of the intention of an action. The most common of the two consequentialist theories, utilitarianism, considers the optimum good in relation to society as a whole.<sup>36</sup>

Jeremy Bentham, to whom the term is credited, conceives of the principle of utility as the balance in favour of happiness over unhappiness evaluated in terms of alternative actions. The idea is taken further by John Stuart Mill who argues that the only proof for

---

<sup>36</sup> *The other theory, which has had marginal support, takes an action to be right if it benefits the individual (in the first person sense) the most or is the least harmful, after taking into account all possible alternative actions.*

the desirability of something is that someone desires it and that because everyone desires happiness or pleasure then the most desirable thing is happiness. The aim of morality, therefore, is to secure the greatest happiness for the maximum number of people.

Mills' conception relates good to happiness or pleasure. Another view, however, is that maximising happiness as maximising good is not sufficient. What about maximising other goods such as knowledge, friendship or care, for example? A claim could be made that these goods also bring pleasure but it would be more difficult to claim that their goodness could be reduced to the pleasure which they may bring.

How, then, does one apply the *Principle of Utility*?

To start with, each person must be counted as one and all considerations of race, creed and custom must be jettisoned. In assessing happiness, future as well as present generations must be considered. And, finally, happiness must be assessed in totality in order to avoid reducing utilitarianism to a theory that suggests that one ought to do what makes most persons happy; the aim is to maximise happiness irrespective of whose it is.

Contemporary utilitarians apply the principle of utility in one of two ways. Act utilitarians believe that it should be applied to measure the outcome of each individual action against how much good is achieved. Rule utilitarians, however, believe that it should be applied to measure the consequences of adopting a general rule which is marked out by a specific action.

There are a number of problems encountered in utilitarianism.

In holding that each person's happiness counts for one in the total score and that the aim is to promote happiness, regardless of whose it is, it is not clear why we should do this. Is this something that we actually want, we ought to want, or is it something reasonable to want? And given that utilitarianism focuses on the consequences of an action for a majority, the principle of utility lays ground to injustice to a minority. No reasons are given to explain the authority to override the happiness of one person in favour of a majority. Therefore, a major criticism which can be levied against utilitarianism is that it gives us no account of justice.

From a utilitarian standpoint a profession may be considered in terms of the good it is able to promote and the harm it is able to prevent. Here, special rights and duties will be

attributed to professionals if it is thought that it will end in more good than or less harm than other compelling duties.

### **Deontology: Kant**

Should, as the deontologists maintain, ethics not concern itself with the rules and principles we employ to guide or constrain our actions instead of focusing on the consequences of actions?

Kant believed that moral judgements are imperatives, rationally motivated and universal. For Kant the only good is an action of the will motivated for the right reasons, and it is the exercise of reason which helps us to discover correct moral precepts. Actions which result on this basis are those done from duty.

A good and free act of the will, then, is one done not through inclination or passion but one which has the right reasons for doing it. Actions are good not because of the consequences which may follow but are good because they are the right thing to do. This, however, does not tell us anything about how we should know what our duty is.

Kant's response to this is to claim that duty is acting with respect for other rational beings which runs together with the idea of universal principles that should govern all our actions. But what of a principle which governs all persons? Kant puts forward the principle of the *categorical imperative* which is expressed through three formulae.

To begin with, the categorical imperative gives that we find our reasons for acting only after all contingent realities have been set aside. If this imperative is followed, then we will only be doing what reason requires and will not be subject to individual inclinations and interests. This binds all rational beings : *act only on the maxim which you can will as a law for all rational beings.*

The demand for reason is at the same time a demand that we respect reason not only in ourselves but in everyone else. In the course of engaging our individual pursuits, we must persuade others of our actions and cannot veto or override the reason of others as though it were worthless. To do this would be to use others as only a means to our purposes: *act so as to treat rational beings always as ends in themselves and never as means only.* In a contemporary light the categorical imperative may be seen not only as a principle binding the individual will but may also be seen as a an instrument of negotiation within a system of 'side constraints'. That is, a moral law which does not tell us what to do but what we cannot do.

Not only are we bound to respect other rational beings but we are also bound to find reasons for justifying our actions to others. In this sense we are led to the idea of an ideal community in which all rights are respected and all duties met: *act so that the maxim of your actions might become a law of nature in a kingdom of ends.*

Weaknesses of Kant's approach may be highlighted by asking whether reason alone is sufficient to provide a motive to action and whether it is not possible that someone could mistakenly believe a morally abhorrent rule that the world should live by.

An alternative deontological outlook centres on the principles that govern society as a whole rather than the actions of individuals; the aim being to attempt to establish universal principles of justice. This is best captured between the approaches of the seventeenth century philosopher John Locke, who argues from a natural rights position, and the contemporary philosopher John Rawls who develops his argument from a 'reasonable' person position.<sup>37</sup>

### **Deontology: contractarian approaches**

Locke asks us to engage in a thought experiment in which we imagine a world which has no laws, social norms or government and in which rational beings come together to determine ethical principles for all social and political communities. These principles are analogous to those of the categorical imperative in that all rational beings would agree such principles and would hold universally. Locke maintains that every person is born into the world endowed with natural rights which are innately human and cannot be taken away. When our imagined rational beings come together to determine principles, they formulate a social contract that forms the basis for an agreement between themselves and their government where natural rights are protected. Rights, therefore, are the deontological precepts which are used to construct and judge all social, political and economic life in their rules and governance.

---

<sup>37</sup> *Like Locke, Hobbes and Rousseau used the social contract as the foundation for their political philosophy. Hobbes believed that a contract must be enforceable to be of any value. Enforcement, therefore, must come with the deal. Rational beings would enter a contract to establish a sovereign (single person, parliament) who would have absolute authority to enforce the terms of the agreement. The sovereign, as a creation of the social contract, could not be party to it and is able, therefore, to disregard its terms as long as the terms are enforced against all others. For Hobbes, the sovereign acts as the enforcer of a system of laws to which obedience is the cost of membership. Obedience is exchanged for the benefits of civic peace.*

*For Rousseau, human beings are both good and free by nature. They become bad to the extent that their freedom is diminished and the cause of their diminishing freedom is institutions. These can enhance freedom only if democratic. In surrendering to this arrangement the citizen chooses to be overridden by the rest of the community but the surrender is also an enhancement.*

*Like Hobbes, Rousseau's contract creates a new corporate entity with its own personality. When considered as passive it is called the state when active it is called the sovereign. Contrary to Locke, Rousseau rejected natural rights.*

*Common to all forms of the social contract is the principle that our obligations are self-made and self-imposed.*

Rawls (1971), on the other hand, asks which principles of justice would rational beings conceive if a 'veil of ignorance' was drawn across social reality. He asks us to enter a hypothetical world where we do not know the social characteristics and facts that distinguish us from others. Rawls maintains that people would have to formulate principles that are fair to everyone since they are not in a position to predict which principles, if chosen, would favour them individually.

However, the main objection to Rawls' argument is that from behind the veil of ignorance are we not also discounting conceptions of the good and values that really make rational choice possible? The social contract approach of Rawls is similar to that of Kant's deontology in that like Kant, Rawls tries to reach a rational motive by taking away all real motives. But again, is it reason alone that motivates us?

Professional ethical roles from a deontological outlook may give rise to a number of different approaches. If the focus is on individual freedom, then the picture of a professional person may be painted as no more than a citizen who, in a capitalistic society, is free to choose an occupation and similarly free to choose clients and conditions of practice. In such an approach the rights and obligations of the professional are no different to those of the private individual. If the emphasis is on the rights of those requiring professional service then professionals may have special obligations attached.

Alternatively, if the focus is on duties rather than rights, then contractarian approaches to professional ethics may be formulated. One argument may be that on entering professions, professionals commit themselves to special responsibilities from which follows that the fundamental obligation to fulfill one's agreements gives rise to special duties for everyone in those professions. Such an argument seems credible given the existence of professional codes of conduct and the pursuit of common standards of practice within a profession.<sup>38</sup>

However, contractarian approaches leave open to dispute that even if we were able to uncover what the professionals role should be in an ideal society (under the veil of social ignorance), how can we be certain that the same professional role would be appropriate for the society we actually find ourselves in?

Another deontological account may give that professionals have obligations to the public on the basis that their training has come about through the support of government policies and the public purse which also establishes the institutions in which

---

<sup>38</sup> *As is the case with commercial mediation practitioners.*

professionals' education takes place. Professionals, therefore, are indebted to the public for their nascence and pursue a role whose parameters are set by public will.

### **Virtue Ethics**

The traditional antithesis between deontology and utilitarianism has prompted a different approach to ethics according to which the basic judgements in ethics are judgements about character.<sup>39</sup> This approach encompasses two principal arguments: firstly, that at least some judgements about the value of dispositions to character are independent of judgements about the rightness or wrongness of actions and, secondly, that the idea of virtue justifies the idea of right conduct. These arguments run contrary to a popular view of the relationship between virtue and rightness, shared by deontologists and utilitarians alike, in which the value of character traits relies upon the value of the conduct that these traits are seen to produce; the concept of right behaviour comes before the concept of virtue.<sup>40</sup>

The distinction between virtue ethics and non-virtue ethics theories can be summarised in relation to describing human action as having three features:

(1) that it is a specific event (2) carried out by an agent and (3) that it has determinative consequences.

Each of these features can generally be seen to comprise the objects of moral evaluation and judgement. So each different type of theory can be identified by the feature that it takes to be the primary object of moral evaluation. Deontological theories place emphasis on the evaluation of the act, virtue ethics theories emphasise the evaluation of the character of the agent and consequentialist theories evaluate the outcome of the act.

Virtue ethics reverses the idea that the judgement of the rightness or wrongness of actions (deontic judgements) is prior to judgements about character (aretaic judgements). The degree to which this idea is taken differs amongst proponents of virtue ethics. Middle-ground approaches maintain that whilst judgements of character are

---

<sup>39</sup> Prior to Anscombe (1958) normative ethical theory consisted primarily of the two traditions of deontological and consequentialist ethics. According to the former, morality is based on the moral law the features of which are that it is universal. The same features are found in consequentialism which compels us to maximise utility. Anscombe's view was that because most people no longer believed in God, it is necessary to set aside legalistic moral language and locate morality firmly in the notion of virtue. To achieve this, Anscombe argued that it was necessary to pursue a much more developed moral psychology.

<sup>40</sup> Virtue ethics as an agent oriented ethical theory is more personal than utilitarian or consequentialist theories in as much as the latter consider what is good for society as a whole rather than what sort of person one should be.

independent of judgements of actions, some judgements of acts are similarly independent of judgements of character (Slote 1992). Other versions give that there are no judgements of acts which are independent of judgements of virtue. Such versions range from reductionist claims that we can use deontic concepts of right and duty as long as we keep in mind that they are derivative of aretaic concepts, to those claims that we should banish deontic concepts completely (Anscombe 1981, MacIntyre 1985).

Proponents of virtue ethics most commonly cite Aristotle to support their arguments and present Kant as the chief adversary. However, the Aristotle versus Kant approach has been over stated and work by contemporary virtue ethics theorists shows that the difference between the two is less marked. This is indicative of a view that ethical theories resemble each other more than they differ.

The framework of virtue ethics offers two principal alternatives: an ethics of virtue or an ethics of duty (which addresses all non-virtue ethics approaches including utilitarianism and Kantian deontology). Contrary to the traditional classification presented in this paper, deontology and utilitarianism do have certain features in common; that all people are bound by some universal duties; that moral reasoning is restricted to the application of principles and that the value of virtue is derived from the concept of right or good. All these features are contested by virtue ethics.

A virtue ethics approach to professions may not recognise professional role distinctions if it is thought that there is an ideal human nature to which every virtuous person should aspire and achieve. However, it may be held that if it is possible to have different (normatively) valid ideals and, in particular, if those ideals can be defined by an act of commitment, then there may be a distinction between the virtuous professional and the virtuous layperson. The kind of commitments which professionals make can also differ. For example, in the case of a commitment to client service, the virtuous professional will be the one who is pre-eminent in satisfying the needs of clients, or society. Or, perhaps, a commitment is made to excellence in the skills that the professional utilises in the course of practice. Consequently the nature of the commitment may point to whether its pursuit is an act of professional virtue or not.

## **ETHICAL STATUS**

### **Professions, business and trust**

The conduct of professionals and the standards which they lay down are the subject of ethical debate which tries to steer a path between the values expressed in the emergence and existence of the profession itself and those of the prevailing economic and political climate which includes the clientele the profession serves or aims to secure. In attempting to reconcile these factors, we return to the question of ethical



status and the extent to which it differs between the professional person and the non-professional person, and whether the aim of a profession and the conduct of professionals within that profession are ethically acceptable. The latter leads to considering what ethical principles should guide the professional's relationships with clients and how they are different from non-professionals. Attempts, therefore, have been made to find if the values of professions differ from those of business and whether the aims of both are compatible.

Pritchard (1997), following a deontological line, holds the view that acting ethically is fundamental to professional life since a profession, above all else, wishes to use its knowledge for the public good. She starts by saying that unlike the provision of service which is seen as the basis for the relationship between professional and client, the relationship between business and customer is characterised by the supply of goods.<sup>41</sup>

Customers become purchasers because they want certain products of business whereas people become clients because they desire a particular good such as spiritual redemption, health or justice. Trust is seen as the overriding factor in the relationship between client and professional. This is attached to the idea that a professional makes a public promise to serve people who have a particular need of a particular good; for example, the sick have a desire for health.

But a customer, too, has some need that a business can provide. Payment does not appear to be the critical factor since a client pays for the services of a professional in the same way that a customer pays for goods from a supplier or manufacturer.

The success of a professional in carrying out his or her job is not evaluated solely on the basis of expertise but must be evaluated within an ethical framework. The term 'professional', then, carries with it an ethical undertaking so that to act unprofessionally is to act unethically.

Business can also act ethically or unethically but saying that it does or does not has no bearing on whether the business is good in terms of the success with which it makes profit. For example, an appeal to a businessperson that he or she has a *duty* to protect the environment is misapplied. Unless laws restrict the ways by which business makes profit, we can only make appeals of this nature on the basis that a particular duty applies to all people. So the values under which business operate are not the same as

---

<sup>41</sup> Pritchard qualifies the term 'service' by referring to the increase of occupations in ancillary health care, management and human resources, claiming professional status which has run concurrently with the general increase in the service industries. Here the term 'service' is applied to distinguish services from manufacturing or supply. She does not deny that those in the service industries have expertise but claims they are not professionals.

those of professionals. If a business does operate under some sort of ethical umbrella then this is a matter of choice for the business and of no option for the professional. The professional offers a service of value to society as a whole and, in that respect, there is a relationship between the public and the professional.

### **Market values and trust**

A different picture of ethical relationships has been articulated by Fukuyama (1999) through the concept of *social capital*.

In his discussion on the deterioration of social order in western societies, Fukuyama characterises modern post-industrial society as the development of an 'information society' propelled by technological advance and change coupled with a culture of individualism.

Fukuyama sees a tension in western society between seeking to widen individual freedom and the continual reformulation of rules needed for co-operative behaviour which curtails the extent of individual freedom. This continual reformulation promotes increasing fragmentation and disorder in society which is less able to implement common goals. If we accept that society needs rules then we need to address the question, whose rules? This question, though, is difficult to square with a culture in which tolerance is seen as a great plus and any attempt to decide matters by one's own ethical perspective or cultural norms is seen as a minus. We are left, then, with the problem of cultural relativism which Fukuyama confronts by focusing on social capital which he defines as 'a set of informal values or norms shared among members of a group that permits co-operation among them.'<sup>42</sup> However, the sharing of values and norms on its own, does not guarantee the production of social capital since the values being shared may be wrong in the first place.

If all members of a group behave honestly and reliably with each other then they will eventually begin to trust one another. Trust, therefore, is the stuff which makes for the effective management of a group, albeit effective groups can be formed where there is no social capital by the use of contracts and legal systems. The difference between these formal mechanisms and the informal norms said to be at the heart of social capital is that there is a far greater cost involved in the monitoring and administration of the former.

---

<sup>42</sup> *Cultural relativism is the belief that cultural rules are unrelated social constructs of different societies (or groups within them) and that there are neither ethical principles which are universally applicable nor any means by which to judge the norms and values of other cultures. Essentially it is a reaction against Western rationalism.*

*Fukuyama's general thesis is that humans have a natural predisposition to society; co-operative behaviour has a basis in human genetics and is not culturally constructed on its own.*

Social capital, therefore, is seen to be fundamental to civil society; that is, all those groups and inter-relationships that are to be found between the family and the state.

Despite the fact that it is possible for social capital to be directed towards bad ends, it is widely held that to have social capital is a positive attribute of civil society.

Fukuyama then discusses the changes in norms and values under the theme of increasing individualism. He describes traditional society as one in which individual choice is substantially restricted, and social obligations, through the bonds of family, religion and social class, are prevalent. This is in contrast to modern societies where individual choice is pursued at the expense of the ties of social obligation. In modern society we relate and connect more with those who we choose rather than being connected by involuntary or inherited ties. The effect of this is that the loosening of ties and obligations is not limited to those associated with traditional societies but moves on to unravel and undermine the social ties that underpin voluntary institutions which inhabit modern societies. Under such circumstances the authority of many institutions and groups is challenged (including government and professionals). The issue of trust, both public and private, is, therefore, crucial.

Turning to social capital in terms of capitalist economy and ethics, Fukuyama rallies against the idea that capitalism is detrimental to moral life and is inherently self-destructive because of its 'bottom line' mentality. His argument is built upon identifying a confusion which results from linking social capital to public good from which it mistakenly follows that social capital is not effectively produced by the free market of capitalist economies. In other words, social capital is seen as a positive value to society, leaving no possibility for individuals to reap the benefits of social capital which they embody and, as a consequence, have no motivation to create. So it is left to non-market forces by either state intervention, particularly through a public education system which is provided as a public good, or non-government groups like families, the church and generally all voluntary organisations that do not have a financial goal.<sup>43</sup>

To the contrary Fukuyama says that social capital will be produced by private markets because it is in the long-term self-interest of individuals to produce it. Though the end result may not appear to be that different, the point is not to confuse altruism, which values action for its own sake, with long-term rational self-interest which strives to gain a reputation for values such as honesty, reliability and quality. This thought is elaborated in a comparison between market exchange (a transaction carried out for the mutual

---

<sup>43</sup> *On the basis that professional firms generally do not manage their professional staff through bureaucratic rules and standard procedures, professional education is seen as a major source of social capital in any advanced information society.*

benefit of buyer and seller), and reciprocal altruism (which also involves an exchange of benefits).

Why, then, is market exchange thought of as an amoral transaction whereas reciprocity is endowed with 'moral weight'?

The only distinction to be found is in the timing of the exchange. In a market transaction the exchange takes place concurrently, and in the case of reciprocal altruism, one party may confer a benefit to another without the prospect or certainty of any immediate benefit in return. Whilst market exchange is not reciprocal altruism, that does not mean they have no relationship. For Fukuyama, reciprocity is fostered by market exchange which extends from the economic into the moral world in which the self-interest of those who engage in it is fostered by moral exchange.

Fukuyama concludes that the discussion of ethical relationships in modern capitalist societies should not revolve around the character of economic exchange itself but, instead, devote attention to the subject of increasing change and uncertainty. This conclusion partly reflects what Adam Smith had pointed to in relation to the significance of trust in the professions where their ethical status was seen to align with the expertise required of professional services in order to deal with the uncertainty and changing nature of professional work. Trust and expertise were key to the market sector which professions occupied.

Fukuyama's conclusion can be associated with the idea that trust is a key feature of our management of risk in modern society and that patterns of trust develop to deal with the risks of a particular age and place (Giddens, 1990, 1991). In modern society tradition has been replaced by faith in the value of change and the interpersonal nature of traditional communities has been displaced by the increasing dominance of abstract systems, especially electronic processes. In pre-modern society, the trust that was vested in priests and local wise people, who were seen as the guardians of tradition, has now been replaced by trust in expert systems; that is, trust in institutions. So in a society which no longer has the certainty and security of tradition, its functioning and maintenance relies on advice by experts. In this sense, a profession can be seen to function as a sort of global risk manager.

### **Virtue, role identity and responsibility: three converging concepts in developing ethical perception**

Between them, Fukuyama's and Pritchard's arguments highlight the problems which arise when setting up an antithesis between profits and social good. These problems

are associated with the focus of the study of professions and how the substantive ethical theories actually contribute to the formation of professional identity.

Allegedly, professions have a greater ethical responsibility which sets them apart from other occupations from which has followed a generic distinction between business and professions. Little, however, is left for the individual practitioner with which to engage in terms of developing ethical perception other than reliance on an ethical code to evaluate moral concerns and decisions.<sup>44</sup> This touches on the point that as a feature of professionalisation, the expectation of following a profession's ethical rules seems to be based on certain assumptions; that the work of a professional is different to the work of other occupations; that the accepted practices of a profession can be laid down in a set of rules that can be used as the basis of sanctions against transgressors; and that a set of rules conveys a sense of professionalism that gives moral grounding to the practices carried out in the name of the profession. But can a set of rules form the basis for development in professional ethics and can such rules guide a professional's sense of professionalism and sense of personal responsibility within a community of professionals? <sup>45</sup> Moreover, moral education in the professions which relies heavily on the study of codes of ethics could contribute to a narrow view of professional and business life; their study being more relevant to the discovery of the moral assumptions which are articulated by the professional group.

Hughes (1928) says that one side-effect of professional training is that the candidate takes on board a:

*'professional conscience and solidarity. The profession claims and aims to become a moral unit' (Hughes, 1928: p.762).*

Hughes uses the notions of secular and sacred to describe different divisions of labour and to suggest that in certain occupations the process of sanctification takes place. This process involves a dependency upon bureaucratic status and pre-occupation with issues of competence, expertise and authority from which arises moral legitimisation. In

---

<sup>44</sup> *Ethical perception is taken to mean the capacity to recognise an ethical issue in a complex situation which is as important as ethical reasoning in considering practical ethical problems. The ethical imperative of competence, demanded by professions themselves, the market or government, ignores this, and appears to be solely concerned with expertise in a particular area of knowledge.*

*Ethical perception should also be distinguished from applied ethics. There is no science of morality which is applied to practical decision-making in the way that the science of physics can be applied to engineering problems. The term 'applied ethics' suggests that answers to ethical problems may be arrived at when the particular case is considered to fall under a general moral rule or set of rules. But the idea of 'moral expertise,' if it can be called that, does not arise from having specialised knowledge but from having a highly tuned sense of moral imagination.*

<sup>45</sup> *At the same time, professional work involves some sort of moral anchor which is not limited to a code of practice or code of ethics but also arises in respect of knowing what to do since no code can prepare a professional person for every eventuality. Hence the importance of developing ethical perception.*

a search for identity, this, more than anything else, contributes to the standing of professionals. If we were able to transport the Hughes of seventy-five years ago to the present day, he might be describing the problem rather than the end result.

The practical aim of understanding the ethical dimension of emerging and established professions could devote itself more to finding a greater integration of professional and business roles rather than formulating and refining distinctions between them. This would not undermine the importance of the social good, traditionally associated with professional motivation, but would avoid reducing the discussion on the roles of professions and business to the well-worn oppositions of self and shared interest and that of profit and social good.<sup>46</sup> It would also acknowledge that:

*'...moral concepts change as social life changes. I deliberately do not write "because social life changes," for this might suggest that social life is one thing, morality another, and that there is merely an external, contingent causal relationship between them. This is obviously false. Moral concepts are embodied in and are partially constitutive of forms of social life. One key way in which we may identify one form of social life as distinct from another is by identifying differences in moral concepts' (MacIntyre, 1971: p.1).*

Professions and business may have their own particular aims and practices but that does not mean that the ethical dimension of each is mutually exclusive. Key is how we conceive of trust in the professions as a primary element of social functioning. Although Fukuyama examines trust in the context of business, he reminds us of a point that Pritchard forgets, which is that trust is a 'by-product' of human interactions. It is not surprising, therefore, that in Pritchard's passionless account of professions and business, words like reliability, modesty, loyalty, non-vindictiveness, wittiness, toughness, courage and so on do not feature; *words which we understand as the virtues and which describe the subtleties of personal dispositions that serve human interactions and signify the roles and responsibilities associated with those dispositions in different contexts.*<sup>47</sup> In turn, this appears to do with the lack of identifying the particular meanings of trust which may be attributed to particular roles.<sup>48</sup>

---

<sup>46</sup> This remains congruent with Johnson's view that greater insight into professions is to be gained if attention is moved away from attempting to examine occupations' pursuit of self-interest to examining the conditions under which professions emerge.

<sup>47</sup> For example, toughness, like most virtues cannot be reduced to self-interestedness but neither can it be an altruistic trait of character. Toughness is a virtue but callousness is not. Toughness means being persistent and having confidence of vision but does not mean indifference or treading on other people. Toughness can cede to another virtue (Solomon, 1997).

<sup>48</sup> This also has significance in relation to corporate personality.

## 4 WHAT DO WE MEAN WHEN WE SAY TRUST?

### **Social capital and avoiding the commoditisation of trust**

Social capital has emerged as a dominant concept in the understanding of modern society. Perhaps as a reaction against individualism and an increasing alertness to globalisation, the concept has been used as a vehicle to attempt to put back the 'social' into capitalism.

In discussing how economics has colonised other fields of study, Fine (2001) makes an uncompromising attack on those non-economists who have taken on board the concept of social capital and have done nothing to enhance greater understanding of their own disciplines.<sup>49</sup> Fine does not say that social capital should be banished from the realm of other disciplines but believes that the concept had other avenues to go down before being used against other social sciences. Although this colonisation by economics is not our concern here, it leads to the point that one of those unexplored avenues is to pay attention to identity as a way of reintroducing a 'sociological slant' to the concept of social capital (Fevre, 2000). It also exposes how Fukuyama looks at trust.

Fukuyama is interested in the rules which facilitate social order rather than self-organisation. He believes that social order has been destroyed and reconstructed throughout history. In the same way that the industrial revolution led to the creative destruction of social capital, the information society, propelled by technological innovation over the second half of the twentieth century, has led to disruption. He argues that this process of destruction and reconstruction is a prerequisite to economic prosperity. But how can we be certain that social capital will always be reconstituted in the form demanded by new times? Fukuyama's answer to this question provides our point of departure; he says that humans are biologically predisposed to society and that cooperative behaviour, therefore, is not independently constructed by culture. In Fukuyama's socio-biological emphasis, history has no role to play and, as such, provides Fine an exemplary instance of economic rationalism and the 'imperialism of economics.'

In contrast to Fukuyama, we are trying to look at the way social capital can serve to enhance our understanding of professional work and trust which is *not* ahistorical, and

---

<sup>49</sup> For example, referring to the work of Coleman (1988), social capital is simply the extension of economics to address 'the handling of market imperfections and public goods/bads' (Fine, 2001: p. 76). Fine continues to accuse Coleman of turning social exchange theory - which looks at how social relations, norms and all social structures are to be understood in terms of behaviour, and the appropriate types of individual behaviour or motivation which we should address - into social capital theory by 'the primitive appropriation of economics' (Fine, 2001: p.79).

refers to the 'person' rather than the 'human'. Key to this approach appears to be identity;<sup>50</sup> a mechanism which enables individuals to put social capital into effect:

*'Instead of putting our faith in the infinite renewal of social capital which is supposedly guaranteed by human biology, we should be thinking hard about where our aspirations to social identities are being produced if they are no longer being created as part of the process which produces social capital'* (Fevre, 2000: p.106).

Applying the point which Fevre makes to our discussion of professionals means that if we see social capital and trust as not being context contingent, then professionals are seen as no more than commodities or 'characters' in the market with neither individual identity, motivation, nor desire for self-organisation. Identity, therefore, turns into commodity together with social capital. And with it trust moves from being at least a desirable social feature, or even a moral good as Hirschman (1984) sees it,<sup>51</sup> to being a commodity. We can contrast this what Giddens says about trust.

#### **Professions, social reflexivity and self-interest**

Giddens (1990,1991) believes that in modern society tradition has given way to faith in change and that abstract systems are increasingly replacing personal interaction in traditional communities. More and more personal trust is being transferred to expert systems embodied in institutions or professions. He discusses three phenomena in his examination of trust in institutions and their management of risk in modern society; human violence derived from industrialised war, social reflexivity, and personal meaninglessness arising out of personal reflexivity. It is the second and third of these phenomena which are of relevance here.

The process of social reflexivity forces society to face up to the unintentional effects of modern society.<sup>52</sup> This process is experienced in three ways; firstly, through the threat to society's natural and cultural underpinnings as a consequence of its own developments and activities; secondly, through the threat of having to redirect its resources into the process of confronting the threat itself; and, finally, the trust which society has in its own

---

<sup>50</sup> Unlike pre-capitalist societies where identity was predominantly given through family, religion and local community, in industrial capitalist societies identity derived from work became increasingly important.

<sup>51</sup> Hirschman sees trust as a moral good in that unlike economic commodities, trust increases with use and decreases with disuse.

<sup>52</sup> The process of social reflexivity is different to the reflective processes used to examine these effects as soon as they are identified. One obvious example is car pollution. At first, toxic emissions produced by cars and other vehicles are seen as something no more than unattractive. But after a while these emissions begin to have an impact on the structures of society; forests are lost due to acid rain, buildings decay and health suffers because of the greater prevalence of respiratory disease. The social activity of transportation now has negative side effects both on the ecological system and on society.



structures is constantly having to face up to the negative effects of critical functions such as manufacturing and transport. The same process is at play at individual level.

Where protection of society is no longer to be found in the security of tradition and local community, we find ourselves influenced by experts who advise us on subjects as diverse as psychiatry, learning leadership skills and developing strategies for dealing with emotional conflict. So as individuals we locate ourselves and our normality within expert systems against which we can measure our adequacy. We have adapted to the concept of reflexivity to manage change and uncertainty, replacing pre-modern society's assumption of individual stability in a community. In this way the components of personal identity are susceptible to the same instability and erosion of meaning to be found in the trust and security of the structures of society.

One weakness in what Giddens says is that in believing that the prominent feature of the self in modern society is its reflexivity, he also believes that this is a tangible process in which the individual has real control in this constant reconstruction of his or her self (Craib, 1998: p.2).

What impact, then, does this have on professions and professional roles? The current perception of professions is that they are increasingly promoting their own self-interest. Perhaps it is an unavoidable consequence of market ideology and the widening spread of capitalism that professions will become more and more concerned with self-interest. But this is not the only view of professions. There is also the idea of a profession as a group of independent individuals with a particular expertise dedicated to the service of the community who are able to agree to regulate their practice through a code of ethics. But the picture of a profession drawn here is not the picture of an institution of the free market. It is an organisation in which individuals organise their lives and acts as a bridge between the individual and the state as part of what was once understood as 'civil society' (Craib, 1998: p.59). It is difficult to deny that both views of a profession contain degrees of truth, but a profession cannot be seen as one thing. Nor should we expect that individual members of a profession are motivated in the same way and to the same degree.

Giddens would say that trust has moved from the local to the abstract. Trust in the local practitioner has been transferred to trust in the profession as an expert system which is subject to a degree of distrust. But businesses (that is all those occupations that are considered not to be professions) can also claim that they pay attention to the development of trust in their products or services. So are we able to arrive at meanings of trust that are specifically attributable to professions? What we are missing from

Giddens' account of social reflexivity is a fuller description of the dimensions of trust in its modern state.<sup>53</sup>

### **Classifying trust**

One approach to examining these dimensions is to see how the term 'trust' is used in everyday speech and look at its linguistic properties and integrity. What follows in this section is an adaptation and extension of the work of Little and Fearnside (2000). Using their examples, occasionally with some minor changes, we begin to see how trust is unstable in nature and how the security of trust as the basis of modern professional relationships is problematic.

#### ***1 I am a trusting person.***

Used as a term to describe personhood, the word indicates that we may be predisposed to the act of trusting through acquired attitudes of mind.

#### ***2 Trust in God.***

Here there is a call to faith in the sense of a trust in infallibility. Trust as faith is not limited to religious contexts. This may emerge as faith, say, in a patriotic cause. As an article of faith, it supports the system from which it is constructed. Therefore, without an article of faith, the system cannot be sustained. Typically, this is an area where the world of religion and the world of science collide; where an attack on the system of the faithful by science is defended on the basis that 'these things have been sent to test us' and, therefore, our faith. For example, Darwin's evolutionary theory of Man and God's creation of Man.<sup>54</sup>

#### ***3 I would trust that person with anything.***

This usage indicates a recognition of general virtues in a particular person. That trustworthiness is held in high regard signifies our esteem of those capacities (virtues) which can be trusted to provide a level of certainty in a changing environment. Together with 6 and 11, this forms the basis of Giddens' idea of the primary functioning of modern trust, except that it is directed to expert systems rather than interpersonal trust. Trust helps in the coordination of activities without resorting to competition, duress or sanction (but may play a part in all three), and in high risk situations and complex activities it enables commitments to be made.

#### ***4 We trust Caesar to lead us to victory.***

---

<sup>53</sup> That trust as a key component of social capital has been rarely examined has been acknowledged in particular by Gambetta (1988), Dasgupta (2000) and Fine (2001).

<sup>54</sup> Little and Fearnside give this as an example of trust which is not 'rational' (their parentheses) because the a priori basis of faith is proof against disproof.

Trust refers to specific rather than generally recognised capacities; for example, leadership, toughness, courage and so on. It is a class of personal trust borne of belief.

*5 I trust you are in good health.*

The usage here is akin to the word hope.

*6 I entrust myself to your care.*

A declaration of trust given to the expert in recognition of his or her knowledge or procedural skills. It acknowledges a gap in education, training or capabilities. In this situation, the greater the gap, the greater the trust required, since the parity of understanding between the layperson and expert is more likely to be remote. When trust is spoken in this way, it also suggests an element of hope in that the person making the declaration hopes to benefit from his or her commitment to the expert. The same can be said for statement 4 since we hope that Caesar's best endeavours (excellence) will win the battle.

*7 He's a nice enough man, but I wouldn't trust him with my money.*

Pointing to the indexical nature of trust, this indicates that the meaning of the word changes with its context. In speaking about the same man, we could find ourselves saying that we trust him implicitly when he is talking about anything other than money. As soon as money is mentioned, our trust is no longer forthcoming.

*8 He seems to know what he's talking about, but I still don't quite trust him.*

This points to the feature that trust and distrust are not dichotomous. Trust, therefore, is scalar; that is, it has magnitude without direction. That trust has scale is signified in sentences such as 'I trust him completely' and 'I'm not sure we can altogether trust the figures in this report.' We also speak of 'qualified trust' and 'unqualified trust.'

*9 I have stopped trusting him because he has lied repeatedly.*

This indicates the reflexivity of trust. The magnitude of trust changes in accordance with our experience of the outcomes of trust. A continuing commitment to trust is gauged through evidence of the actions and virtues of others.

*10 We will have to trust what he says because he is an elder.*

Like trust associated with religion, this denotes infallibility in the object of trust and has its roots in tradition.

*11 I don't trust professionals.*

In contrast to the positive aspect of distance in education or capabilities as expressed in sentences 4 and 6, the negative aspect in this use of the term reveals a social and

ideological stance towards tradition and institutions. There is also an important link here to the concept of corporate personality. Institutions have a personality in the moral as well as legal sense. They can have rights and duties, and can be reviled and trusted. The relationship between corporate personality and personal responsibility has its impact when we ask the professional to respond to the question why should we trust you or trust what you do?

**12** *You will have to take this on trust.*

Here, there is an appeal for acceptance of the knowledge and truth claims of the speaker. It emphasises the link between trust and truth.

**13** *I trust the Boeing 747 because it has such a good safety record.*

Trust may be directed at things as well as people. In this case it acknowledges confidence in the reliability of performance.

These sentences reveal the spectrum of meanings of the word trust. It has inferences of faith and belief, commitment to an ideological position or religion, or to knowledge grounded in tradition. It can also infer admiration and respect for virtues in a person or as an expression of confidence in a thing. In certain instances the word trust is nearer to the word hope. More generally, it has an association with concepts of truth and the truth-value of statements.

It can be used as a recognition of distance between the person making a commitment to trust and the person being trusted. Given the discretionary nature of trust, we can also say that the concept of trust is incompatible with the concept of contract: although that does not deny that there may be contracts which form the basis of a relationship of trust.<sup>55</sup> A point made by Baier (1995) is that the stability of a relationship of trust can be evaluated by seeing if one party is taking advantage of the other by exploiting qualities of the other in ways which would need to be kept hidden if the relationship is to continue:

*' a trust relationship is morally bad to the extent that either party relies on qualities in the other which would be weakened by the knowledge that the other relies on them' (Baier, 1995: p.123).*

This brings to light the significant distinction between the normative and contractarian views of trust. In contracts we are given the terms and content of an exchange of responses and behaviours in relation to the intentions of the other.

---

<sup>55</sup> For example, contract conditions are not to be found in child/parent relationships. As time passes the change in the relationship is determined by moral persuasion

So far, then, we can identify the characteristics of the term trust as:

- predispositional; we are disposed to degrees of trust or distrust
- indexical; its meaning is influenced by context
- scalar; we speak of trust in degrees between complete trust and total distrust, and associated with this,
- reflexive; we gauge our level of trust in accordance with our experience of the outcomes of our trust
- transferable; we can transfer our trust if we consider this appropriate.<sup>56</sup>

Having identified these characteristics, we can classify trust according to trust in:

1. **self**: ranging from self-confidence (when it is tempered by other virtues) to arrogance (when it is not).
2. **the person**: placed in the individual or in the individual according to his or her identified role.
3. **groups**: local, such as family, or institutional, such as professional group.
4. **human constructs**: either *material constructs* such as aeroplanes, or *abstract constructs* which can be grouped into either structures of *symbolic interchange*, such as money, or *systems*, such as education which provides a service or those which provide expertise.
5. **transcendentals**: religion or ideology.
6. **contract performance**: that is, trust in monitored performance which involves a necessary level of trust in both the trustee to carry out the contracted service and in the organisation or body to enforce the contract in case of breach. The discretionary component is restricted in this trust relationship and also brings into play the concept of primary trust (service trustee) and secondary trust (monitoring agent or system). This involves a tension when more trust is seen to decrease openness to challenge and scrutiny; in particular, when trust helps informing new relationships as a component of entrepreneurship and gives greater possibility of freedom from external regulation.

---

<sup>56</sup> Little and Feamside give an example of this in the sentence: 'I have moved my account from the Bank to the Credit Union because the Bank refused to honour my cheque, even though there was money in the account.'

This classification not only gives a more diverse picture of trust but also underlines an ingredient left out of the discussion of trust which is the concept of the person; a moral being whose identity and moral motivation may, in part, be influenced by the experience of membership of a particular group. At this point we can intervene with contemporary virtue ethics derived from Aristotle which has sought to reinstate the person as the primary subject of discussion in ethics.

### **Virtue ethics and moral motivation: dealing with self-interest and altruism**

Many moral philosophers make a clear separation between the moral world and the rest of human life. For them, ethics begins with the question, 'what is my duty?' Aristotle, on the other hand, begins with a much broader question; 'what is it to lead a good life?' This allows him to examine those areas that we associate with the moral together with other elements of human life such as friendship and intellectual commitment, and to consider their interrelationships and what it is to construct a good life out of all these elements. This richness of what morality consists makes Aristotle distinct amongst many other moral philosophers. For example, utilitarians use happiness and unhappiness as the single measure of all moral behaviour, believing that the desirability or non-desirability of all moral actions could be calibrated with the same measuring instrument.<sup>57</sup> Aristotle not only refuses to reduce the many things of value to one single measure but goes further to say that it is not possible to approach a complex context with the same blunt measuring instrument. People coming into a complex ethical situation have to be alert and responsive, and be able to shape themselves to the particular situation. The judgement or discrimination lies in the perception of that situation; that is, having the ability to respond to the situation both intellectually and emotionally. So in Aristotle's sense, the word 'moral' means 'practical'; morality does not refer to a set of inviolable rules but to those human dispositions or virtues that make life liveable. The formulation of rules, then, must wait upon the development of this moral perception.

For Aristotle, virtue is not a skill but an exemplary way of interacting with other people; a way of bringing about, through one's own intellect, emotions and actions, the aims of one's particular community. If we think of honesty, for example, it is not a virtue because it is a required skill to achieve a particular goal, but is a virtue because it represents the ideal of open dialogue and knowledge. Nor should virtue be considered as a solely

---

<sup>57</sup> It could be thought that Aristotle is offering a type of utilitarianism since he thinks that the ultimate good in life is the happiness of human beings (1095a18-22). However, the focus here is on the character of the virtuous person rather than the effects of the virtuous person's actions. Also, the usual translation of 'eudaimonia' as happiness does not capture the full meaning of the word. In its common usage the word happiness is understood as a mental or emotional state. 'Eudaimonia' is something more than this. It refers to living well and acting well (1098b21). To say that someone is a 'eudaimon' is to make reference to how that someone lives and to what that someone does. Unlike happiness, 'eudaimonia' is linked to the idea of success and it is for this reason that Aristotle is not attempting to tell us how we are to be morally good or simply happy, but how to lead successful lives.

moral category. We can distinguish between moral virtues such as honesty and non-moral virtues such as a sense of humour.<sup>58</sup> The aim is to see what part a virtue and its relation to other virtues plays in human life: 'the central question is not "what ought I to do?" but rather "what sort of person ought I to be?"' (Louden, 1997: p.205).

Despite the criticisms which can be made against Aristotle<sup>59</sup>, two aspects of his virtue ethics are appealing. Firstly, it is both a theory of morality *and* a theory of moral development. We acquire the virtues by acting virtuously and becoming virtuous is good for oneself and others. In this way Aristotle's argument avoids the problem associated with moral motivation when the individual good (self-interest) is divorced from the common good (altruism). Unlike Pellegrino and Carroll (2001) who question the success with which virtue ethics has reversed the dominance of self-interest in the professions, the point here is that virtue ethics removes the binary nature of the discussion regarding the distinction in moral motivation between professionals and business people.

Secondly, it provides an antidote to those ethical theories which have focused on the concept of duty or have assumed that people are governed by a universal concept of it; a preoccupation which has been responsible for promoting a legalistic and rule-bound view of morality.

We have duties only to the extent that we are in a position to fulfil them and the extent of our responsibilities is governed by what is under our control. But this leads to the paradox of 'moral luck' (Statman, 1993) which results from two contrary assumptions; the first is that personal responsibility is restricted to only that which is in our control (what is not a matter of luck); the second is that in reality we are not in control of our lives since luck determines most facets of our being and actions.

Nevertheless, the immunity to luck has been 'hard wired' into our modern concept of morality, and if we are able to give up this idea then we are in a position to give up the idea of 'moral' as a separate category from 'non-moral.' The radical nature of virtue ethics is, therefore, to be found in the rejection of the term 'morality' in preference to the broader term 'ethics.'<sup>60</sup>

But why should this matter to trust and social capital?

---

<sup>58</sup> Sometimes, however, it is not always obvious under which category a virtue fits; loyalty, for example.

<sup>59</sup> Aristotle's ethics has been discounted by many on the grounds of its elitism. Virtue is the latent potential only to be found in the citizens of the polis. But citizenship is not open to women, foreigners or slaves and even then 'goodness can only be induced in a suitably receptive character' (1179b7-29). He is also silent on the subject of religious belief and religious motivation, and his analytic approach makes no concession to human sentiment. Some may also be put off by his unyielding pursuit of success.

<sup>60</sup> But that does not mean we must reject rules, the concept of duty or the idea of absolute prohibition.

## 5 Trust and role identity

*'Capitalism is today an immense cosmos into which the individual is born, and which presents itself to him, at least as an individual, in so far as he is involved in the system of market relationships, to conform to capitalist rules of action' (Weber, 1904-1905/1958: p.54).*

We are currently living in a predominantly capitalist society. 'Capitalism appears to create what is perceived to be a division between economy and society, or market and non-market.' (Fine, 2001: p.28). Virtue ethics gives us a framework to deal with this perception head on in that it takes account of persons in their historical and social context<sup>61</sup> and need not rely on rules playing a part in moral motivation.<sup>62</sup> Moral motivation, therefore, is attached to the person not to the prescription of rules, a view which Anscombe (1981) defends by arguing that the idea of the unjust person has effectively disappeared and the concern for who the person is has been taken over by a detached consideration of what he or she may or may not do. Actions, therefore, have replaced persons, and behaviour has been abstracted from people in the sense that their role identity has been erased.

In many conceptions of social capital this abstraction appears in the form of trust in the sense that its diversity of meaning is ignored and its use value is detached from the people who rely on it. When trust is accounted for solely as a medium that helps modern societies to function more efficiently, and is, therefore seen to be socially desirable, or perhaps as Dasgupta (2000) has it, a matter of being able to predict the behaviour of others when we have incomplete information,<sup>63</sup> the account is dependant on the commodity or use value of trust. This poses a difficulty. For example, it is straightforward enough to say that trust is desirable but saying so does not mean that when we recognise that trust is lost (since it seems to be maintained through an absence of contrary evidence), it can be rebuilt by managing or regulating behaviours which are thought to have led to its loss. Rebuilding trust may, therefore, require intention and disposition which is different to developing trust; possibly, an admission of guilt or shame extending to an apology which may also require compensation and/or punishment. Shame and guilt, however, are bound up with ethics not commodity.

---

<sup>61</sup> MacIntyre goes further to suggest that the concept of virtue is secondary to that of a role figure who is always defined by a particular culture. For example, Athenian virtues in classical Greece are different to those of Medieval Christianity and the Enlightenment.

<sup>62</sup> Nor, importantly, play a significant part in education.

<sup>63</sup> Dasgupta (2000) puts forward a number of points regarding trust. To be credible, trust requires incentives and the threat of punishment by an enforcing agency, for example; interaction between individual and agency is also required as is taking account of and estimating one another's perspectives; its value is measurable and deals with the expectations of other people's actions.



Giddens' view of trust also faces a problem. The fact that trust may be seen to secure greater certainty in human activity is no guarantee of it. Trust, therefore, should not be confused with the absence of risk. The matter of trust still remains a matter of judgement which requires some element of ethical perception. In addition, trust is not always associated with socially desirable outcomes<sup>64</sup> and is open to abuse. So as a positive attribute of social functioning trust can only be associated with values that have boundaries and are not absolute.

If trust is particularly important to professional roles then we need to look at the relationship between role identity and motivation which the concept of the person engages: to look at the individual in the particular role and the publicly expressed values of that role.

Regarding commercial mediation, the government sees its success defined by the satisfaction of the parties and its own satisfaction with the impact that mediation has on the cost and the efficiency of the civil justice system. But satisfaction in the resolution of disputes is not as straightforward as arriving at an adjudication which presumes to bring the dispute to an end. Satisfaction extends to the parties' assessment of how their individual needs and interests have been met in the final outcome of the dispute. In effect, the parties are involved in a transformation in what they think about the outcome of their dispute in addition to how they will approach the next one. To that extent, the measure of ADR in the form of mediation is not procedural. It brings to light the difficulties when only settlement is used as the measure of success. Not only is pushing parties into settlement contrary to the principle of self-determination<sup>65</sup> but the other benefits associated with mediation can be pushed aside if settlement, which is clearly important, is pursued relentlessly.<sup>66</sup>

So, the motivation of the Government may not necessarily be congruent with the motivation of individual mediators to practice. Mediators' individual values and ethical approaches will bear upon the degree to which the 'strategy of professionalism', if any, is pursued.

---

<sup>64</sup> *Such as trust found in criminal fraternities.*

<sup>65</sup> *Emphasis on the parties' rights to self-determination and informed consent lies at the heart of mediation. This is antithetical to the supporters of a rights based culture in a civil justice system that places emphasis on the use of litigation to resolve disputes. In the US, Fiss (1984) argued that every time a dispute in litigation was settled, it deprived the courts of giving a decision which was good for society because the law was there to be interpreted for the benefit of society at large. Moving the responsibility for dispute resolution from judges to disputants, therefore, was harmful for society because justice was eroded with every settlement.*

<sup>66</sup> *For example, the ethical choice between being evaluative or facilitative is made on the basis of the type of benefit the mediation process is thought to offer. If party autonomy is identified as a benefit then the use of evaluative mediation is unlikely to be appropriate.*

## 5 PERSONALVALUES

### Role identity, motivation and responsibility

#### **So far**

Before setting out the approach and strategy adopted for the mediator interviews it is worth summarising where we have reached so far.

We began with a concern expressed by Morris (1997) in the US who believed that professionalising mediation would unduly influence the practice of mediation through the promotion of North American values by a formalised elite. This extended to the recognition that the values of the market place are spreading globally but that the values of mediation do not refer solely to the market place. The question arose as to how the values of individual mediators compared with the publicly expressed values of their professional group or organisation. In response to the attack on professionals and professionalisation we suggested that in a global society trust building groups such as professions may be of growing significance. We also suggested that in looking at trust we turn away from the opposing theoretical positions of duty and agent ethics and, instead, look to virtue ethics with its focus on human capacities (character). The trusted mediator was introduced as the organising concept of the case study.

Chapter 2 turned to the subject of our case study and began to look at the values of commercial mediation in the UK expressed by government and lawyers by reference to an 'emerging profession.' We also referred to CEDR's re-branding exercise to support some observations in relation to the current shape of the occupation of commercial mediation.

Because professions have a significant ethical dimension Morris' suspicion of professionalising mediation was used as a catalyst to look at the two principal ways in which attempts have been made to define professions. We underlined the view of Johnson (1984) who sees the application of the term 'profession' to an occupation is to do with a 'strategy of professionalism' which primarily strives to secure and maintain an exclusive relationship with the state.

Having looked at some of the obstacles in trying to pin down any universal characteristics of a profession we addressed the question of whether members of a profession have a special ethical status. In order to do this we presented different responses to the question of whether there are professional ethical roles. We identified these responses through three families of approaches to ethical theory; consequentialist, deontological and virtue ethics.

Returning to ethical status, we took an example of one argument which tries to distinguish professions and businesses on the basis of their values. In this example Pritchard (1997) features trust as the dominant relationship between the client and the professional. Pritchard argues that the trust relationship is extended to one between the professional and the public since the professional makes a public commitment to serve those in need of a particular social good. This argument was contrasted with Fukuyama (1999) and his socio-biological view of ethical relationships which he describes through his particular concept of social capital. Fukuyama also features the importance of trust but attaches to it an emphasis that a market economy does not undermine the social good.

Pritchard's and Fukuyama's approaches were used to illustrate the problems we face when trying to distinguish between professions and business when we rely solely on an antithesis between the social good and profit or altruism and self-interest. We concluded with three interrelated points:

1. in looking at the ethical dimension of modern professions it may be more engaging to examine how we try to reconcile professional and business roles
2. the roles and responsibilities associated with personal dispositions in the context of business and professions could be described with more subtlety through the words which we understand as the virtues
3. if trust is common to both professions and business then the meanings of trust in particular roles require greater articulation.

We began to look at the third point in the previous chapter by rejecting Fukuyama's notion of trust in social capital. Fukuyama speaks of humans not persons. In excluding the concept of the person, the components of which include identity, self and motivation, he describes people and trust as if they are commodities. His socio-biological outlook gives us no way of using the concept of social capital to gain a deeper understanding of modern professional work nor how social capital is put into effect in specific cultural settings.

We turned to look at trust through the eyes of Giddens (1990, 1991). He argues that trust in the local professional in traditional society has been replaced in modern society by trust in the profession as an expert system. Although Giddens, unlike Fukuyama, acknowledges context, we were still missing a more detailed description of the dimensions of trust. Utilising and expanding on the work of Little and Fearnside (2000), we identified the pre-dispositional, indexical, scalar, reflexive and transferable

characteristics of trust. We then classified trust according to trust in the self, the person, groups, human constructs, transcendentals and contract performance.

Having undertaken this exercise we left the subject of trust to say why we were looking at the ethical status of professionals from a virtue ethics perspective. We referred to the virtue ethics model derived from Aristotle which combines a theory of morality and a theory of moral development.

In the Aristotelian sense morality refers to virtues that make life worthwhile and desirable not to the identification and prescription of rules. This brought us back to the concept of the person since virtue ethics focuses on relationships with others as part of a person's identity and being moral as being a particular type of person; that is, the focus is on being rather than doing. Moreover, the appeal of the dual aspect of Aristotle's theory is that it bypasses the problem of moral motivation when the individual good (self-interest) is separated from the public or social good. In other words, virtue ethics defines our approach to the ethical status of professionals since it has the merit of eliminating the black and white distinction between the moral motivation of professionals and business people.

Paralleling the adoption of a virtue ethics approach we acknowledged:

- a concept of social capital which takes into account context and history and recognises a greater depth and subtlety to the different types of trust
- the concept of the person, one category under which trust can be classified.

We supposed that if trust is significant to professional roles and social good is associated with professional motivation then it requires an examination of the relationship between role identity and motivation and how that relationship squares with the publicly expressed values of that role.

But trust also encompasses the notion of responsibility which can be taken at two levels; the responsibility of the individual in practice and the responsibility of the profession to society. At an individual level, responsibilities give rise to more doubt as to how to approach a situation and how to deal with it than obligations (Whitbeck, 1992). At the same time even if, as individuals, we have an acute sense of personal responsibility we may be out of step with understanding the wider implications of the role of the occupation or profession in society.

A sole emphasis on codes does not do much for developing ethical perception nor engaging in the changing ethical situation of the occupational group. This is associated

with the difficulty that a client's interests and needs may be at odds with the public interest but a code gives no help in outlining the scope of the principle of public interest, and at the same time, the role of the profession is not dealt with nor the role or scope of the profession's code of conduct (only familiarity with the code).

Following a professional code of conduct and focusing only on individual obligations without examining the limits and role of the profession is very much to blinker the question of professional responsibility. For example, whilst it may be that commercial mediators have different value emphases for mediation and different approaches to practice, their work is ultimately founded on the number of settlements they can deliver.

Three areas, therefore, are live to ethical engagement in professionalisation:

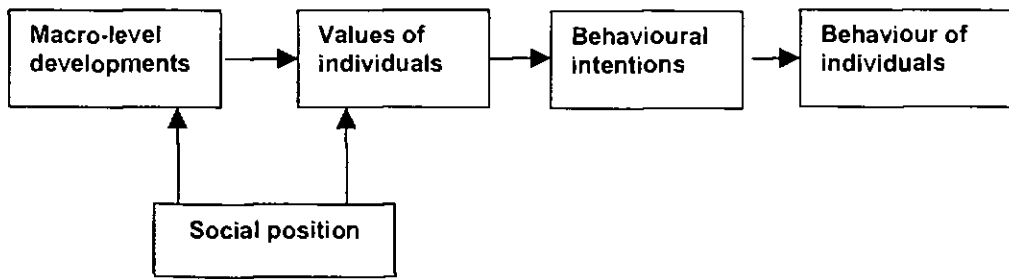
- the application of personal values within the context of the occupation's role
- exploring what role the occupation should take in addressing broader societal issues and its part in social reform
- consideration of the professional's responsibilities beyond those of adhering to a professional code.

We now reach the point where we have to describe our approach to value research in light of the conceptualisation of values adopted by this research project.

### **Approach to value research and associated problems**

According to Johnson (1999) ethics in the professions appears to be based on an assumption of a person being a rigid self with two competing elements comprising self-interest and a 'higher' moral self. However characterising ethical thinking in this way does not seem to ring true. We do not reason syllogistically when it comes to ethics. In practice, in other words, we do not say this situation is a case where a particular principle applies and, therefore, I must act in this particular way.

Johnson, basing his argument on research from the fields of linguistics and cognitive psychology, says that many ethical concepts are not universal but prototype concepts which are deep in our experience. Values, therefore, are part and parcel of our personality. A simple model (Fig.3) appears to lie at the heart of approaches to value research.



**Fig 8. Value research: core model**

The model is based on two assumptions; firstly, that a person's behaviour is based on behavioural intentions which, in turn, are moulded by values; secondly, that a person's values are influenced by their social environment and their social status. These assumptions result in two pathways for the links between three levels of analysis: moving from macro-level circumstances and context to a person's value orientations to a person's intentions to a person's behaviour. The model also indicates that social position is linked directly to values. (Van Deth and Scarbrough, 1995).

In Chapter 1 of this paper we referred to intentional understanding which aims to explain appearances through concepts by which we experience and give meaning to our interactions with others. It involves identifying descriptions of conceptualisations of the world which we construct out of subjective experience. Value is one such conceptualisation.

Given its subjective nature it is not surprising that the term 'value' has different meanings. The sociological concept of the term embraces norms, manners and ideologies. Additionally, desire, reason and necessity appear as the foundation of values in philosophy and psychology. As such, there seems to be no common understanding of value across the disciplines nor do specific disciplines achieve any consensus on the use of the term.

A value(s) can be seen as:

- a standard
- a standard by which we judge what is important
- something regarded to have worth
- something we aim for
- a principle by which we act
- beliefs in action
- qualities to which we conform

- personal virtues.<sup>67</sup>

The difficulty extends to value descriptors too. One person's interpretation of 'integrity', for example, may be different to another's. It could be argued that it may be easier for people to make explicit their values if they are asked 'what do you value' rather than 'what are values.'<sup>68</sup> But this approach presents a problem for the researcher in that it gives little basis for an analytic strategy. We need to specify a conceptualisation of values without having to ask people what values are.

Following Van Deth and Scarbrough (1995)<sup>69</sup> we use three characteristics to formulate the conceptual boundaries of the term 'values.'

1 values engage moral discourse which means we need to look at the sort of moral discourse which would indicate the social dimension of values. As moral concepts, values cannot be detached from all those situations and events which make up our everyday lives and everyday environments. Values are part of the way we think, make judgements and behave. What this means is that values cannot be researched on their own. Because everyday life involves participation in different groups and activities people find themselves having to reconcile with family, professional, business and other values; these can be broadly categorised as private or public, individual or group values. Because people occupy different social environments values must be examined in their social context. And different contexts infer different values.

2 values present themselves as conceptions of the desirable.<sup>70</sup> A desire is a wish or want; an expression of need. When we say something is desirable, however, we engage

---

<sup>67</sup> *Until the late nineteenth century the term 'value' was used only as a singular noun to mean to hold in high regard or worth. Nietzsche introduced its plural form as personal virtues in his attack on Christianity and Judaism which he condemned as dogmatic and oppressive. He argued that each person should be able to choose his or her own personal virtues (or values as we now refer to them).*

<sup>68</sup> *Since interviewees can give answers grounded in their own experience and beliefs.*

<sup>69</sup> *Van Deth's and Scarbrough's research examined the influence of values and changing values on beliefs in Western European governments. Their approach to identifying values is to treat them as orientations which give a framework to an individual's attitudes and behaviour. Given that values are not open to direct observation, values assume the status of a dispositional concept. This means that the presence of values and their influence can be shown by looking at the realisation of values in defined contexts. This applies to value orientations where it is possible to describe a social context. If values are hidden behind attitudes then finding a pattern among a number of different attitudes points to some non-observable phenomenon at work. Our research, however, does not extend to taking values as components in a pattern of behaviour nor is it a values clarification exercise that aims to establish a list of common values amongst mediators.*

<sup>70</sup> *Van Deth and Scarbrough refer to McLaughlin (1965) who identifies three common characteristics of values: they cannot be observed; they are not to be found independent of biological organisms or social environments; and they have cognitive, effective and connotive aspects. McLaughlin believes that all descriptions of the value concept which are not qualified by these three characteristics are either arbitrary or are dependent upon the underlying theoretical context of the particular research project. He maintains that three specific questions need to be confronted: firstly, whether values refer to desire or desirability; secondly, whether values have a rank order in a personality system; and thirdly, whether values are determinants of behaviour. In the context of their own research, Van Deth and Scarbrough discard the second and third questions. These, they think, must present themselves for empirical testing rather than an a priori response since it would be difficult to arrive at*

with moral considerations in which 'want changes to ought' (Van Deth and Scarbrough, 1995: p.26). Values, therefore, tend towards prescriptive rather than descriptive statements.

3 values cannot be observed directly but there seems to be a general consensus that values play a significant part in action; that is values are 'desirabilities in matters of action' (Van Deth and Scarbrough, 1995: p.30). They are the measure of the ethical dimension of actions which, for the purposes of our research, include making judgements and reaching decisions in how we choose to be. But whilst values are associated with questions of action, they are not in themselves prescriptive. For example, justice may be considered a value but that does not give us any clue as to what actions we need to take to arrive at justice.

### **Analytic strategy and interview framework**

One of the central tenets of the practice of mediation is the concept of neutrality. The term 'neutral' is often used to describe the mediator as an impartial practitioner. Clearly no mediator can be strictly neutral in the sense that he or she can discard all his or her values, attitudes and beliefs (Brown and Marriott, 1999). This applies not only to when a mediator is mediating but also to how the mediator locates and establishes himself or herself as a professional person. The concept of neutrality is useful in that it helps us to remember that in its broad usage 'neutral' does not cover the mediator's undeclared values. It also serves to remind us of the peculiarity of the mediator's work environment in which the *client* always consists of more than one party. In any event, ignoring the concept does not assist the practitioner in developing his or her own ethical awareness.

71

Values are essentially subjective, developing as a result of an individual's experience and social context. Whilst we can reflect on values, it is more difficult to reflect on what lies behind their formation. A question arises, therefore, in connection with the capacity of commercial mediators to reflect on the value components of (1) their social role and commercial mediation generally and (2) their practice as individual mediators. Our research is restricted to exploring (1) in relation to the 'strategy of professionalism.'<sup>72</sup>

Whilst the Government is showing support for mediation and ADR, do we assume that the increasing practice of mediation constitutes the emergence of an institutionalised

---

*answers to empirical questions about values when values are abstract principles. So they focus on the question of whether values are desires or desirabilities.*

<sup>71</sup> Brown and Marriott (1999) highlight three general areas of ethical awareness for mediators. They refer to mediators' attitude to conflict, their capacity to deal with emotional parties in relation to a notional rational-emotional spectrum and the awareness of their own individual values and beliefs.

<sup>72</sup> Ethical issues related, for example, to dealing with conflicts of interest, preserving impartiality, maintaining confidentiality in mediation etc are not encompassed by this research project.



profession or that the conditions of trust are based on professional legitimacy? Many of those who call themselves mediators may well want to pursue a 'strategy of professionalism' but this may be a professionalism increasingly borne of client control and market demand.<sup>73</sup>

We want to explore how commercial mediators articulate their own values in terms of the role of the mediator with which they identify and to what extent they see themselves as participants in the emerging profession. This has two components; (1) mediators' perceptions of their own role, motivation to practice and sense of responsibility in the emerging profession and (2) how they look at their professional environment. This involves separating analytically the mediator's self-image as a professional from any claims to emerging profession. The objects of analysis are not values but individuals who experience membership of a particular group; in this case, they are pioneers and influential practitioners in the commercial mediation community.

Our framework for interviews is, therefore, composed of two sets of questions derived from the two principal research questions:

- (1) Do mediators privately accept the values of mediation expressed publicly by Government?
- (2) Can the social role of mediator be seen as a sociological category (if it is not then we are talking about the adoption of a particular practice by an existing profession or group of professions rather than the emergence of an exclusive profession).

The first research question is addressed in interviews by prompting with the questions:

- What are the quality goals of mediation?

These as Morris (1997) points out may be any one or a combination of party autonomy and self-determination, party satisfaction, community solidarity, social justice, social order, personal, group or societal transformation, cost/efficiency, settlement rates and any others identified by respondents. Our analysis will need to distinguish between five types of value claim:

- Instrumental (x is good for y)
- Intrinsic (x is good)

---

<sup>73</sup> The possibility of variance in trust raises questions regarding both the professionalisation of commercial mediation and whether a value model is enough to describe it.

- Comparative (x is better than y)
  - Decision oriented (x is right)
  - Idealised (x is good as it can be)
- How do you measure success in mediation?

The second research question is addressed in interviews by prompting with the questions:

- Do you see mediation associated with the practice of law or the practice of dispute resolution?
- What must mediators know to practise?
- What do you see as the drivers for the regulation of commercial mediation?

## 6 VIRTUOUS MEDIATORS

### Changing context

Despite the fact that the use of mediation is increasing, Genn (2002) reports that commercial practice lawyers are still hesitant to use mediation despite evidence of positive experience. Clients using mediation who signal the highest levels of satisfaction with mediation cite mediators with excellent skills and familiarity with the subject area of the dispute. Also, whilst mediation may save the potential cost of progressing a case to trial through earlier settlement, those cases which do not settle through mediation increase the parties' costs. One view suggests that a party who thinks it has a genuinely strong case is unlikely to mediate. Another view is that if there is a strong commitment to settle the case through mediation then solicitors should be capable of arriving at a settlement. We have also seen the landmark case of *Dunnett v Railtrack* in which the defendant (Railtrack) winning its case on appeal, was declined an order to costs for having turned down a recommendation by the court to consider mediation. Now, if a party flatly refuses mediation, even if it believes it has a water-tight case, then it will be penalised in costs. However, this stick which the judges are beginning to wield may bring potential challenges for both the government and mediators. The use of mediation is likely to increase but with the accompanying risk that unless the parties can see the benefits of using mediation rather than responding to the potential danger of cost sanctions, a disaffected party may enter the mediation process with no genuine intention to settle with the result that litigation is prolonged. For those mediators who see settlement as the purpose of mediation this may pose an ethical problem in that they may see the parties as abusing the process. For those mediators who do not attach settlement as the priority this will be less of a concern.

Set in this changing context, how commercial mediators understand their role is of increasing significance. How they perceive their roles not only gives a starting point for developing their ethical perception but will also begin to structure questions related to the identification of types of mediation interventions to which the mediator is ethically allied.

### Interview summary

Eight leading commercial mediators (identified M1 to M8), who are or have been closely associated with CEDR, participated in semi-structured interviews. Amongst them two were women and three were non-lawyer mediators. Apart from prompt questions, no attempt was made to establish a uniformity of questions or content in the interviews. By sending papers to them beforehand, as described in Chapter 1, interviewees were encouraged to elaborate on those points they felt relevant and follow their own line of thought and offer comments.

Key statements, transcribed from the tape recordings, were broadly categorised by responses in connection with and discussion on the prompt questions identified in the previous chapter.

The two primary research questions (1, do mediators privately accept the values of mediation expressed by government? and 2, can the social role of mediator be seen as a modern sociological category?) were addressed by relating the categories to the types of value claim and value associations made in connection with mediators' own perspectives on mediation, their professional identity and sense of responsibility. The purpose of the interviews, therefore, was not to identify common values but to set out mediators' value descriptions and to see how far these were congruent with the values expressed by government and how they located themselves ethically regarding their role and professionalisation.

### **Three value claims and three countervailing concepts of settlement, transformation and power**

In their interviews mediators' responses were expressed through three value claims with different emphases (underlined in the text). Lawyer mediators in the group tended to contrast mediation with litigation practice whereas non-lawyer mediators described a similarity in their approach to negotiation and working relationships. For lawyers, mediation was generally seen as an antidote to the negative aspects of the litigation process although this did not imply that mediation was an alternative or replacement for litigation.

*'I saw litigation as taking people away from the truth...also a horribly inefficient process...game-playing and posturing...there wasn't even always a good clean knockout so you could say right I've won...often ended up in a muddy compromise. Mediation seemed like a much more efficient process by creating a climate of trust and focus...to get right to the heart of things and that people would behave from their better selves rather than their worse selves so there's a developmental aspect, quite a moral approach to it to do with human potential, learning and growing, learning from things that go wrong rather than being self-righteous and positional and blaming which is what I see the litigation process encourages.'* (M3)

*'It seemed to me that litigation was quite wasteful of peoples resources, energies, emotions...if people could negotiate, as some could, through their lawyers or barristers that was the ideal way of sorting things out...but the either or of if you can't settle this then you go to litigation and spend masses of money and building up a case against the other person seemed to be a bit of a*

*nonsense...don't get me wrong I'm very pro litigation, every society needs a litigation system because that's part of a democracy and I'm also a believer in the "shadow of the law" principle I don't believe people would mediate successfully if they didn't have the courts...not a matter of human nature that everyone wants to settle if only they had an opportunity.'* (M1)

*'I think we are here to mitigate wasteful pre-occupation and unnecessary pain which I see as the by-products of conflict. When I come to a mediation what I normally see is people who have spent quite some years having their dispute run for them by professionals who will say they are doing a splendid job, with their clients interests at heart but who in truth are making sure they're getting paid properly for doing so.'* (M6)

*'... the pervading motivation is that it [mediation] gets out of the field in which one set of people tell another set of people what to do. I'm profoundly against that.'* (M4)

For non-lawyers, mediation tended to formalise the positive aspects of their approach to relationships or negotiation in their own fields of practice:

*'I had no conscious sort of tenet of good relations mean good business and it was then unconscious thinking that informed a lot of the work I did because one of the reasons I was used...was when problems occurred we built up a level of trust which meant that people were prepared to work co-operatively to resolve the problems as opposed to becoming defensive and fighting their corner...that was something I hadn't been conscious about until I got into mediation and realised that what I had been doing was something that is very close to what we do as mediators.'* (M5)

*'The method of helping them to negotiate is very similar to that of mediation, except I wasn't neutral. I was representing individual interests... the methodology, being aware of the interests of both parties and making sure things could work post acquisition, kind of led me into mediation. It seemed to be natural that you didn't just win for your client at all costs because what did you do the next day after you've won?...Life begins when you sign the contract, it doesn't end, it's when you start...it seemed to make sense to look forward...the contract is something you worked from not worked to...and mediation then became of interest but as a mediator I had to learn to be neutral.'* (M2)

However, this simple lawyer/non-lawyer distinction did not delineate the range of views in relation to what mediators privately saw as the moral imperative of commercial mediation. In other words, what mediators saw as the purpose of mediation and the type of value claim associated with it was not defined by whether they were lawyers or non-lawyers. Their value claims also determined the extent to which they wished to locate mediation outside the practice of law. But the type of value claim did not necessarily reflect the mediator's own measurement of success in mediations.

#### **Intrinsic value claims (mediation is good)**

##### Emphasis on greater potential for fairness of outcome (social equity)

*'I don't think it's about social order or justice at all...this is a way of getting cases out of the courts not a way of reducing the number of cases or number of disputes...it's a way of dealing with them quickly and cheaply...it doesn't give greater access to justice. If everybody has the right to court then that's not improved by offering mediation, it's just a choice of a method of resolving it which is potentially more efficient and less painful than going through court...the thing that I learnt quite late on, I guess, in life, is that people see the same events and read the same facts through different eyes and that means that any adjudicational solution is flawed because things are not black or white, right or wrong, it's just varying degrees...to me that's one of the best things that mediation can offer is for that to be taken into account and to inform the eventual settlement. I think, actually, that is greater access to justice, upon reflection. If you can measure justice in fairness of outcome...I think there is the opportunity of a fairer and therefore more just outcome in mediation.'* (M5)

This was also set in the context of dominant market forces:

*'I think there is a recognising of the motivation of the eighties and nineties for success being measured by wealth and power and so on...is quite a hollow message... people have gone through it, even those who have achieved it see that there's something lacking...most human beings want to relate to other human beings...and there's no doubt that mediation is a human process, its making people communicate and one of the by-products is that people do often leave [mediation] feeling that they have learnt something that is more than dispute resolution.'* (M5)

*'I wouldn't want to identify it with the practice of law ...because the practice of law is too closely identified with adversarial processes and of course now I'm saying law means litigation which is just one part of it... I don't know what*

*category to put it [mediation] into...fundamentally I think we're just giving people a shot at breaking out of the circle that's created by the litigation process...at base you're talking about creating an opportunity ...a mediator is not a relationship manager...we're breaking out of a system that's been created over generations that is unfair...but there are disputes which need an adjudicated decision...the mediator is primarily building a relationship of trust with the parties. There's nothing legal about that at all.'* (M5)

*'... "enlarging the pie" and having "win-win" situations is a great theory and motivation but rarely happens in practice...it's usually much more "pain-pain" and to a certain extent I use that in mediations because shared pain is as much a reason for settlement as anything else. I don't know if they feel empowered or not...rock-bottom, my objective is to help them resolve a dispute and not go to court...I think a lot of people just want to have a face-saving opportunity to knock this on the head without appearing to give in to the other side...just get rid of it...the more mediations I do... this [face-saving] is quite a significant reason for them agreeing to mediation.'* (M5)

In relation to this mediator's own measurement of success:

*'I'd like to say it's because I give them the best opportunity for them to resolve their dispute...it's they who say yes to settlement or not. I give them the best shot at doing a deal but in my heart I still measure success as settlement...Even if I've given them the best chance I could to settle but if they didn't settle I still feel as if I've failed. It's probably one of the biggest motivations for the follow-up afterwards of the phone calls.'* (M5)

### **Instrumental value claims (mediation is good for society)**

#### **Emphasis on relationship and responsibility**

*'I think it's more about personal development in some way...it liberates people from getting mired down in some sort of negative process...it's like the microcosm and the macrocosm, how people behave in their day to day relationships...some dispute over a contract is also mirrored in the larger arena in terms of world relationships and world events...if people can work out their banal differences in a better way at that level, then that helps society as a whole... that somehow changes the energy...there's more positive energy and less negative energy around how people behave when there's a conflict ...social justice to me implies an ideological left wing right wing analysis...I know some people say that in social justice terms there are problems with mediation.'* (M3)

*'I see it as the practice of dispute resolution...because it's bigger than law...there's overlap between the two...but it's much bigger than law and if you take mediation as a whole, not just commercial mediation, that happens in many fields, some which have very little contact with law like community mediation or environmental...it's a very big field in its own right...the dispute resolution field draws on many disciplines...psychology, negotiation theory, politics and sociology, international relations...loads of disciplines...it just happens to be that commercial mediation tends to be played out in an arena that's about the law but there's no reason why that has to be...even dispute resolution is too narrow...it's about relationship, it's about managing difference at its broadest...What I would like to see is the mediation intervention being made much earlier in the business context...the more we can educate the business clients in seeking assistance with the intervention of someone who is skilled in this discipline earlier...a person who just manages the relationship.'* (M3)

For this mediator, personal success was described in terms of contributing to a social transformation that went beyond settlement of the dispute:

*'...to see a transformation from the beginning of the day where people have not been able to talk to each other ...feeling they have to speak through their lawyers to some exchange where they can deal again...to me there's a satisfaction in seeing that shift...and most of the litigation process obscures that...it's something about people's authentic direct experience...they're moved from a rights position to taking responsibility for their own personal experience...a sense of closure...that people can put things behind them ...a sense of having learnt something from the process...and at a basic level that they have been able to reach a settlement...It would be silly to say that it's not a factor, it clearly is...just that on its own it's a crude measure...the other things I've mentioned in the grand scheme of things, are more important than settlement or not...in terms of my sense of mediation as a larger social movement, phenomenon...and a paradigm shift in the way people relate to each other...then there's a danger [if settlement is the primary focus] of mediators becoming too directive.'* (M3)

Again success was measured at micro and macro levels:

*'I think there are two ways I can look at that. One is on an individual case basis where I think, for me, if I see as outcomes for the parties that they have had satisfaction on the three levels of process, outcome, and emotion and are able to move on then that has been successful. I think there are other ways in which*



*it can be successful too but I think those are three major fronts on which I would look to a mediation to be aiming for. On the bigger front...it dawned on me that what we were doing was actually turning around the legal system...and in terms of how I see that now I see that as being a move to enable people in all walks of life over any kind of difficulty they have, whether it's High Court stuff or whether it's just an interpersonal one, of being able to tap into something which will provide them with the potential for those three areas.'* (M8)

Emphasis on social order (not social transformation)

*'I think it's good and I think it's maintaining social order... all of it is designed to reduce the tension and destructive power of conflict and this is done by mediation, however they actually label it, but it is a mediation process.'* (M2)

*'Practice of mediation to me is to deal with dispute resolution. However, it comes to us via lawyers who are practising it as part of their litigation armour and it comes with all the caveats and the restrictions because the lawyers have invested an awful lot in putting their files together. Their clients have paid for it – they don't want to appear that they've wasted a lot of their time for which they've billed the client...and so I think we are stuck with starting from the position of this is litigation therefore it follows legal principle and what I think we do as mediators we move to creating the environment where parties are capable of resolving their dispute but we have to transform it from one to the other, a different transformation. We're transforming it from a litigation approach to a dispute resolution approach...Incidentally, one of the things that always amazes me is that lawyers sell time [in litigation] and clients are buying results. The two just don't seem to fit together very well...I certainly don't regard mediation as the practice of law...I simply was reflecting on the basis that lawyers think that it might be an extension of law...The reason why people might have come to mediation means that they are prepared to look at some resolution outside the statute, the actual precedent of what's in the rule books...because their case doesn't fit square with that...if it's a matter which has to be settled by rules then it comes to a judge, it doesn't come to me because the lawyers are the gatekeepers...To me what we mediate is not part of the legal system.'* (M2)

However, this mediator was able to detach himself more readily from the idea of success being measured by settlement because of a different perception of his role which is to:

*'...act as a catalyst between the two parties to help them resolve that particular issue...to create the space where they can resolve if they wish to ...they don't have to resolve...I will create the space and the opportunity where you can have a dialogue...If as a result you can achieve some form of settlement that's great and if you don't that's fine. While it is nice when people are able to achieve settlement, that's not my objective as mediator...I'm there to create the space and the environment where you can work to try and resolve whatever it is you want to try to resolve.'* (M2)

So is the mediator someone whose role is to transfer information in a negotiation where parties wish to secure their best interests; a mediator who recognises that the system may be engineered and that his or her intervention would be fatal to the process? Or, is the mediator someone whose role is to help the parties assess their settlement options and to peel away obstacles to settlement negotiations?

*'My own sense of what I do as a mediator is not transformative...I don't feel I need to transform the behaviour of the parties in that dispute...I'm not there as a conciliator and I see transformative mediation as part conciliation, only part...It's very different to the catalytic action that happens when two people get together with the aid of a competent mediator...they may go off to do other deals or they may not...to me that's something they will do but that's not the purpose of why I'm there.'* (M2)

This mediator's orientation was underscored by an observation on the spread of the market economy and its affects:

*'I'm afraid the introduction of the global economy and globalisation encourages more of win as much as you can and not share with others and if as a result, of every ten cases they [managers] lose six, they only count the four and ignore the six...they have to make their reputations on the four.'* (M2)

#### **Comparative value claims (mediation is better than litigation)**

##### **Emphasis on lower cost and greater access to justice**

*'The primary purpose of mediation is to keep disputes out of the court...cost stands pretty high up in the hierarchy because when I say keep them out of the courts there are two aspects...one is having absolutely no control, and I say as a practising lawyer, no ability to predict the outcome. I refuse to say these days what the outcome is going to be because I've given up. Secondly, undoubtedly, it's a question of cost because if you go to trial, inevitably, it means a huge*

cost...your own cost, business time costs, management costs and emotional cost.' (M7)

Also mediation as a reaction to the uncertainty of litigation:

*'I think clients have always wanted more certainty, well, always wanted a measure of certainty and when they ask me for certainty I tell them I can't be certain. That's why I tell them they ought to be mediating...I don't think the courts have helped matters much because they've made the life of a lawyer a lot more difficult because they tend to jump around a lot and change their minds...clients probably ask for certainty a lot more because they're very much more sensitive to the value of money and the way they're spending their money.'* (M7)

*'I certainly see mediation as a very useful tool in my practice as a litigator. That's the fundamental advantage to mediation as far as I'm concerned. In other words, it's something that I can use when I'm acting for clients to resolve their disputes. In the wider context virtually all the reasons for the advantages of mediation within my professional practice have parallel advantages in the wider context be it the Israeli-Arab context or be it a neighbourhood dispute...I see it as the practice of dispute resolution, undoubtedly. It's not really necessarily the practice of law and, indeed, most mediators in the end don't revolve around discussing the legal position...they do at the beginning or, indeed, looking at the various documents. As a mediator-lawyer or lawyer-mediator you will take a view, inevitably, as to the strengths and weaknesses of each particular case but one of the difficulties I find in mediation is it's sometimes a fairly uphill battle to challenge the lawyers on their particular points...I think some of the times one of the difficulties is getting them [lawyers] off their particular hobby-horse without embarrassing them...one of the challenges that face lawyers who participate in mediations is to forget or to appreciate that a mediation is not a rehearsal of the trial.'* (M7)

*'I measure success in my own mediations when the case settles or if the case settles...Now a purist may say, well, it may have been successful if it's managed to narrow the issues, it's got the parties talking ...that may be so, but if I'm actually asking myself...success in a mediation is settlement... My main aim is to keep the thing out of court or arbitration. I'm afraid I strongly feel that court or arbitration is a failure unless there are very, very special circumstances.'* (M7)

But another mediator responding to where cost and efficiency stood in the hierarchy of the government's goals said that these were:

*'...pretty low down. I think some of the important things for government are, sadly, about things like votes, image...and it's the antithesis, in a way, of mediation because for me mediation is a process where the person who is in charge, in a way you could describe a mediator as that, is actually the least important person there...and in government that's not the case...There's also an issue about cost where if the up front costs of putting conflict prevention management and resolution processes in place is identified, its often not justifiable prior to those disputes [emerging] ...to invest that money into a more peaceful future down the line, it's difficult to justify its cost effectiveness...It's not, I think in the government's minds, a positive first thought. It's not the thing that leaps into mind like Kellogs and breakfast.'* (M8)

#### Emphasis on self-determination and autonomy

*'One of the principle goals of mediation is to get away from a system in which one set of people tell another set of people what to do...I think litigation and a legal system perpetuate that...fundamentally, for me, it ought to restore to people an ability to make their own choice about their own destiny but to make that choice with information...with someone there to try and check that they are looking realistically at all the options available to them and the consequences of the choices they might take. That, for me, is the number one priority. Number two, perhaps surprisingly, is the ability to resolve conflict otherwise than through a process of violence in which I would include litigation. Violence in this sense for me is a power struggle...and if people resolve their conflicts merely as the result of exercising power...then I see that as a dismal failure of human relations, whether it takes place on a world stage or on a court stage...so I think the quality goal should be to free us from that...to me it is to do with having respect for people.'* (M4)

The mediator's reference to power relations is restricted to the parties but a mediator's claim to neutrality can itself be used to exert pressure on the parties. The mediator has a great deal of power in the sense of receiving sensitive or confidential information in private meetings and acting as the gatekeeper regarding the conveyance of that information and other messages.

As to success in mediation? Again, mediation was seen as beneficial for society but tempered by the idea of settlement:

*'I don't think there's any one single mark...for one thing if I see someone who is in a position of greater power declining to use it and getting to a solution by different means than, I think, that is a huge success for the mediation and almost for the world...finding a way of resolving it [conflict] without a fight is a success for mediation...I suppose if you're in business as a professional mediator...you have to say success is partly composed of the number of cases you have which settle. You have to face commercial life. People are unlikely to choose you, however good your motives are, if most of your cases end up in non-settlement...the difficulty then for the mediator is the degree to which he might prostitute his principles in order to get a result.'* (M4)

The mediator later added:

*'If I were to be asked the question what do you think people ought to expect of you as a mediator then...I don't think people looking for a mediator in a commercial dispute would pick the things I've picked. I think they would have a different set of values from the mediator.'* (M4)

#### Emphasis on fairness of process

*...the process of mediation is very important...mediation must be and be perceived as being equitable, effective. A process which gives people a genuine hearing...that they feel understood, they come out of it feeling they've been heard... All disputes involve emotion, some more than others...I believe people in mediation have an opportunity to be heard and express their emotions...The sensitivity to people being heard and understood is an incredibly important part of the mediation process ...Outcome is important but the process of being heard and acknowledged is too. Not head-banging.'* (M1)

The last comment points to risk that the more cases judges push towards mediation, the more litigation lawyers may be inclined to opt for those who call themselves mediators and who see nothing wrong with 'head-banging' in the belief that the parties are there to arrive at a settlement, come what may, on the day.

*'I know there is a school of thought that says mediation is empowering and I have a difficulty with that ... I think it may be, it may not be. Empowerment may be a by-product of mediation but it is not the aspiration. Indeed if we as mediators start making it as the basis of our work we are actually behaving improperly. I would go as far as saying that. People don't come to be empowered, to be transformed, they come because they have a dispute which*

*is going to court next Thursday, and what they've asked for in the contract we've offered them is to help them settle that dispute. Settlement, yes, but to reach that goal in a reasonably sensitive way...when people come to mediation they have a dispute they want to have resolved...people don't come to commercial mediation because they want their inner conflicts resolved and they didn't want to come in because they want to be transformed or they want society to be transformed...My personal starting point is they've come, and the contract and the deal is, in order to get a result...Settlement would be my first proposition.'*  
(M1)

### **Professional identity and interpersonal trust: personality versus professional stereotype**

For one mediator the instrumental value claim made for mediation was a challenge to reconcile with the picture of a particular mediator type:

*'I think one issue for me is to what extent I go public on the types of views I've expressed to you about mediation being a morally good thing and good for society...which is what motivates me...and the sort of image of a mediator which I feel perhaps is more marketable of the robust, ex-City lawyer, high settlement rates, gets results, bangs heads together, nothing namby-pamby...and how I present myself in those stereotypes.'* (M3)

This turned on a comparison with lawyer behaviours and a personal attempt to lessen the gap between professional and personal roles:

*'There was a very definite role and behaviour that was different to who I was in the rest of my life and there was a tension between the two that became intolerable and that's partly why I had to leave [litigation] ...to me being a professional as a litigator meant I didn't disclose my own moral position on behaviours that the client was doing...the only time I could challenge what they were doing morally or ethically was when it was in conflict with solicitor ethics...which is a very low slung safety net...it gives a lot of scope for bad behaviour without actually being unethical...there were also values and behaviours about competitiveness, game-playing...out-manoeuvring people...It [mediation] has brought me closer to my non-professional self...I still make a distinction between the two...and there's this whole question about impartiality, neutrality...one of the developmental things for me is how I can disclose more of myself in a non-judgemental way...[neutrality] I hate the word. I think it's really unhelpful...non-partisan is much better.'* (M3)

There were similar views regarding one's personality as an instrument of mediation:

*'I don't feel I take something off when I leave home and come to work and equally, vice versa...I find I get resentful when other people put me in...a role that is not me...and I think I am myself when I mediate. I certainly present myself simply as myself. I don't feel the need to act as anything I'm not.'* (M8)

*'I am increasingly integrating my personal and professional life...when I was younger the professional role seemed terribly important, now I find myself very uncomfortable if I have to put on a mediator persona. I actually can't do it. I can't even put on a lawyer persona... But even before I was a mediator I was increasingly practising in a person relevant way... My way of mediating very much involves me... I can't puff up, they won't come to me if they don't like my style...I can be tough in a mediation but I believe it's not from a posture but it comes from something I can be comfortable with all the time.'* (M1)

However, style equated with personality poses problems. As the same mediator said, 'there is a sting in the tail.' The market is demanding a particular persona; a commodity. This came across in mediators' reactions to whether they were happy with their descriptions in Chambers Guide to the Legal Profession 2001-2002 which for the first time included non-lawyers under its ADR practitioner section.

*'It sounds fine as a start but sounds like a safe pair of hands but not very exciting...I perhaps don't mind it that it doesn't give a flavour of the sorts of things we've talked about.'* (M3)

*'It's not my description, it's others that describe it...[x] is not a word I would use...I think it is a reasonable thumbnail...It hasn't brought me a vast volume of work but that's a different issue. I think there's an issue that commercial people want somebody to help them resolve their dispute...they're going to bring their clients so I think they are more likely to select people who they perceive as being able to cut through and deal with the commercial issues within an initial time frame. If a profile is put before them [clients] with somebody who they perceive as having an ability to communicate and understand with them they're more likely to come to mediation...not just because the CPR rules require them to be there.'* (M2)

*'My immediate reaction was great...one of these litigators is going to read this and think about me and probably say they don't want x to mediate, they want*

*someone who's tough and can control and all that sort of thing. I don't know if that's had any effect on people choosing me.'* (M5)

*'It's a fairly non-committal description... to be described as [x] doesn't really tell you much about his skills as a mediator...it doesn't do me any harm...I don't think it does me much good.'* (M7)

*Although it sticks in my gullet to admit it, I dare say that what Chambers said in 2001 about me isn't far from the truth...If I were to write my epitaph as a mediator those are not necessarily the words I would want at the top of my list...I'm happy that they're there though.'* (M6)

Those mediators that referred directly to interpersonal trust, described it either as a function of the attribute of genuineness or more generally referred to the key ability of mediators to develop trust which was not always seen as essential in other professions.

*'I think you aspire to be genuine...I think genuineness is a fundamental attribute for a mediator...not to have to fake it is important...it is possible to fake it ...I would hope if my sons were sitting on a wall of a mediation watching me operate they'd say yes that's dad doing his usual stuff. I'm not frightened of bringing my personality into a mediation...I'm not sure genuineness necessarily betokens success as a lawyer...it might betoken a more satisfactory relationship with your clients or your colleagues ...rather than fabricating, politicking or some of the other attributes of non-genuineness. The most devious are those sometimes who succeed and that may be true of other professions...it would be hard to conceive of a truly devious mediator ...that sort of person would be sussed.'* (M6)

*'A lawyer, I think, in some ways has to discard any thought of being genuine...genuineness doesn't come into it. Integrity does. That's a different thing as I see it because I have to obey the rules...that's to do with professional integrity. It's different to genuineness. A mediator who isn't genuine isn't mediating...If a doctor is dealing with a patient then, I think, the patient has a right to expect genuineness. It's more difficult for me to see how genuineness is desirable or a required attribute for, say, an accountant or lawyer because it doesn't seem to me to be relevant. What is relevant is competence, integrity, honesty, adherence to a code of conduct...the only case where I think genuineness might be involved is if the professional is dealing with people and is interacting with people and in that context to be ungentle is to be false and to be false is always bad, as I see it, but that's as a human being rather than in*



*the capacity of professional except where the professional has such a high degree of personal involvement, like a doctor that genuineness is a required attribute.'* (M4)

*'I think the skills of a mediator can exist in a person whatever their profession...and it may be that there are common human qualities that are totally disregarding the profession. In other words the profession they're in could be an accident and the thing that makes them a mediator could be a common skill, common attitude...what marks a good mediator more than anything are their personal skills, their ability to build trust. So I don't think it's related to any profession...My belief is that trust is fundamental to all relationships and therefore something that is precious and automatic...I think some people are effective in their profession without the need to build trust...because they're Rottweilers ...someone might use [a professional] who falls under that category because he falls under that category and that trust doesn't come into it. You're using that person as a means to an end.'* (M5)

*'I am me. I can't be anybody else...I don't try and pretend to be anything else. Incidentally, even though we all have individual styles I suspect that any one of us, picking up any mediation, would probably come with the same result even though our styles were different which actually says that the clients are there looking to resolve and the mediator is almost irrelevant In many instances it's almost like the Hippocratic oath or Buddhist oath, "do no harm", and an awful lot of what we do, as long as it is not harmful, the parties will take and find the resolution if they want to.'* (M2)

However, reflecting on potential value clashes that mediators might have with types of mediation case (and expressing one of the fundamental points this project is addressing):

*'I hope that mediators would feel, should feel, that they can say this one for me is too close to the bone. It's not about conflict of interest...and if that is likely to jeopardise your ability to work with those parties most effectively then you should say this one is not for me...I would fear that most mediators would take opportunities as they arise without choosing to look at the personal difficulties for them...I don't think mediators on the whole would turn something down because they thought the material was not for them.'* (M8)

## Personal responsibility

Mediators comments on regulation reflected their sense of personal responsibility in connection with the perceived state of maturity of the profession and public protection from bad practice. But this did not mean that submitting to regulation was securing professional legitimacy on the basis of an established skills and knowledge base, more a recognition of developing an interdisciplinary area of practice.

*'I start off on the basis that in order to help people resolve a dispute you have to be a skilled negotiator...but then behind that there is a series of questions...what is a good negotiator? Is it someone who understands the positions, the laws, the statutes or, and it shouldn't be "or" but "and," elements of human interaction, emotional issues...is that also part of the negotiators armoury? I think it is...a little bit of a psychologist there as well, not trained as such, but it comes with experience...and then to understand the area in which they're working...all the things that need to make the deal work...an awareness of the legal structure in which you are negotiating ...all of that carries into mediation...So where I see any issues of codification [regulation] - because that's what the law is applying to mediators - is to be aware of what is within the legal structure in which you are mediating. I speak about creating the space. Within that is also controlling what's in the space and so I am a gatekeeper. I try not to evaluate...So there is an area where regulation is appropriate. Whether this means mediators all have to be lawyers?...as a non-lawyer talking to a non-lawyer I think we would say this is not necessary. We're not going to advise them on law...but there is an issue there.'* (M2)

*'I suppose I do think the best mediators are born not made...it is perfectly possible to learn the skills...I don't go into a mediation thinking very hard I must do what was taught on the course...I do believe it's a template which you are free to adapt to meet the circumstances you confront.'* (M6)

A similar perspective was adopted by another mediator. When asked what mediator's needed to know to practise:

*'The short and simple answer is nothing because I still think there are some naturals and the naturals do it naturally...I don't put myself in the category of a natural mediator and, therefore, what I have done is learnt and taught what you have to do as a mediator. Since there are very few people who are naturals one does need to be taught the skills, by and large. In many ways you need to be taught what not to do...you obviously need to understand the theoretical process of mediation and your function within that...the art of being*

*neutral...you don't need any legal knowledge as such...you don't need any technical knowledge. I think it helps to have an understanding of the way people operate...People skills, as such, again are things that can't necessarily be taught...I think it also helps to like people, basically. I sometimes worry that I get too high-bound by all the theory and practice' (M7)*

*' They need to know who they are and what they bring in terms of their person and skills...I think they need to know very little. They may need to have read and understood a particular case...This is more about understanding than knowing. I think they need to understand the context in which the case is taking place...that clearly might involve knowing some things about it but they need to understand it because each case will have a different backdrop and it is that backdrop against which you are mediating.' (M8)*

*'There isn't a best practice. There's only the best we know at this moment...like counselling I guess.' (M1)*

The same mediator likened the National Vocational Qualification in mediation to 'brain surgery by numbers.'

*'...on the one hand, I look at people who do environmental facilitation, management consultants, trainers, areas which have some similarity with commercial mediation which get sorted out by the market...so, no, just let the market decide. On the other hand, there's the fact of people doing it badly and giving mediation a bad name...at least that [accreditation under the CEDR course] can curb some of the worst excesses...I think the fact that it has been recognised as a basic minimum is a good thing...in some way perhaps it's about educating the market about the different types of mediation so they know at least what type they're getting...so if they want someone who's going to be evaluative they get that and not think that all mediations are like that, likewise with facilitative...It [regulation] seems something that is more important where you've got some sort of mandatory programme...when people don't have a choice then I think it's important people do have some sort of regulation...for the more sophisticated users then I think it's probably less important...there's something about once you start defining what it is that you do, in a way it starts to crystallise and become more limited and there's a danger of losing creativity and a sense of evolution...also there's the difficulty of it becoming too theoretical...psychotherapy was quite a mature profession, if you can call it that, before it became regulated....I would prefer something more intermediate...an association...minimum standards...developmental, sharing of ideas, support*

*groups...If one extreme is the "Chartered Institute of Mediators" and the other is we should just go off and do our own thing, which doesn't seem right either... What's the middle ground or new model?' (M3)*

*'The government, I think, are inevitably going to move more and more towards court mandated mediation...the courts are already finding it difficult to draw up a list of approved mediators or people they feel have a recognised standard of mediation ability. So inevitably someone is going to say they have to be qualified and how do you measure that qualification...it will satisfy the government...of needing something tangible rather than this awful thing, in their eyes, of recommending individuals who are known to be good...but I suppose for the fear of being seen to be favouring individuals it's easier to pick a standard or pick a body.'* (M5)

### **General summary**

These mediators' statements not only bring to light the complexity of the concept of the trusted mediator but begin to challenge some of the assumptions regarding the traditional ethical framework associated with professions and professionalisation such as claims to a knowledge base, regulatory mechanisms and institutional organisation. But the mediators' statements may also hint at a category of profession emerging out of a reaction to bureaucratisation. These issues are touched on in the final chapter.

## 7 THE TRUSTED MEDIATOR

### Being professional v being a professional

#### Professionalisation

Commercial mediators are committed to a service ideal but this is a service ideal that is not yet fully defined in its value orientations towards professionalisation. Brown and Marriott (1999) comment that professionalisation is sometimes seen as a threat to process informality in mediation:

*'Even those who are uneasy about professionalisation acknowledge that it is "an ambiguous concept." It can refer either to elements of professional activity perceived as dubious, such as elitism, detachment and client disempowerment, or to those more positive and inherent features of professions, such as independence, training, responsibility, expertise and commitment to appropriate values'*<sup>74</sup> (Brown and Marriott, 1999: p.140).

We are taking the line that professionalisation is a process which involves both an ethical and ideological strategy for an occupational group; a strategy that is inextricably linked to the form of relationship the occupational group has with the state. This is significant because the state depends on its relationship with occupations whose practices produce social definitions relevant to state functions and, at the same time, the occupational group is dependent on the state to establish the conditions for practice.

Given that there are numerous viewpoints, agendas and negotiations unique to each occupation we have discarded the idea that there can be a single attribute that can be used to trawl all occupations called professions and consequently have not attempted to show what the occupation of commercial mediation might share with other occupations that correspond to an ideal model of profession. Our concern is not what constitutes a profession but rather the circumstances that lead to professionalisation and what type of profession commercial mediation may become. So the parameters for a description of the conditions for the professionalisation of commercial mediation are not to be found by attempting to see whether commercial mediation qualifies as a profession or not.

It will also be the unique characteristics of the occupation of commercial mediation which will have to influence policy on professionalisation and the ethical framework in which it is enabled as opposed to policy being determined on the basis of traditional (idealised) characteristics of a profession. The characteristics of this opposition are set

---

<sup>74</sup> As Brown and Marriott's own footnote says, this may not be problematic for those mediators who are highly settlement focused but may be uncomfortable for those mediators who place high value on empowerment and problem-solving.

out in Figure 4 and are now reviewed in terms of potential policy implications regarding training, accountability and organisation.

<b>Profession (Trusted mediator)</b>	<b>Profession (Traditional/idealised)</b>
Competence to deal with the particular situation	Expertise
Client as equal (doing things with)	Client (doing things for)
Ideology and developed ethical perception	Code of Ethics
Activity as a way of expressing own identity and personality	Activity as means to an end
Person: genuineness and empathy	Persona
Personal responsibility and group accountability	Regulation
Virtue ethics orientation (suggested)	Duty ethics orientation
Lower bureaucracy	Higher bureaucracy
Professionalisation influenced by the above	Professionalisation assumed by the above

**Fig 9. Contrasting ethical frameworks**

**Government's vision and reforms**

The increasing cost and duration of civil litigation gave force to the development of commercial mediation in support of the government's *Access to Justice* project to make the civil courts more efficient and cost effective in an attempt to deter people from the combative process of litigation. Indeed the government, through the Lord Chancellor's 'pledge', avoided the potential criticism that in asking the public to carefully consider not going to court it did not exclude its own departments and agencies.

We also need to remember that the government's concept of justice is made up of two components. One emphasises the government's responsibility to deliver legal services which are efficient, cost-effective and, therefore, accessible. The second emphasises the administration of justice relevant to when a dispute arises. In this sense justice reflects the decisions taken in the courts, the accountability of the legal services and their ability to provide independent advice.

Civil justice is not simply an arena in which disputes are resolved but a system that aims to provide and encourage dispute avoidance:

*'The Government believes that the civil justice system must play an integral part in supporting good citizenship. It is not just about the resolution of disputes. It is a system which provides a framework which guides the conduct of individuals and organisations within society'* (Lord Chancellor's Department: civil.justice.2000, 2002: p.12)

This statement is linked to the government's vision in the use of technology based systems:<sup>75</sup>

*'...once there is greater access to the law, and guidance on it through electronic means...experts in a field may adjudicate rather than experts in the law, in an increasing number of cases'* (Lord Chancellor's Department. Civil.justice.2000, 2002: p.24)

So the occupation of commercial mediation is not only seen as a resource for the administration and management of the justice system but also as a resource for its moral transformation; a resource to simultaneously maintain social order and effect social change which also happens to be functioning within a technology reliant free market.

### **Legal profession**

As the vast majority of court cases do settle, the government's aims, encapsulated by Lord Woolf's reforms, will be evaluated by whether cases settle earlier without the stranglehold of costs and, subsequently, whether those settlements result in fairer outcomes. Therefore, the government's aims are as much to do with changing the practices of the legal profession as they are to do with encouraging the use of commercial mediation. This feature is important in that whether or not commercial mediators see what they do as an independent discipline or not, they function as mediators who include many lawyers who act as mediators as part of their legal practice. As such the development of commercial mediation in the UK is best understood in terms of private enterprise developing a market for a public service which is closely associated with the civil justice system but is not, in its delivery, necessarily based on knowledge of the law, irrespective of the fact that there are lawyer mediators and that some mediation service providers only use lawyer mediators.

Lawyers dominate the practice of commercial mediation but they do not engulf it. Some lawyer mediators may wish to define mediation in a way that could eliminate non-lawyer mediators but acceptance of a profession of commercial mediation could also be seen

---

<sup>75</sup> 'NHS Direct' is an example

as a potential threat to lawyers who could be barred from mediating as part of their legal practice. More significantly, lawyers have continued to remain the gatekeepers to potential mediation clients and have an influence on the choice of lawyer or non-lawyer mediators.

One lawyer's response to why buyers of mediation prefer lawyers as mediators was that:

*'...lawyers are perceived by the public at large as dispute management specialists. If a person has a tax problem they will seek the advice of an accountant; if their roof leaks they will engage the services of a builder; equally, when they have a dispute, they will, when all else fails, generally consult a lawyer or embark unaided upon litigation where they expect, ultimately, their dispute to come to come before a legally qualified judge.*

*As mediation is a form of dispute management, lawyers are the instinctive choice of the parties to act as mediators. That the skills of a mediator may be very different from those of a judge, arbitrator or adjudicator is a subtlety lost on most of the laity and probably also to a large extent on many solicitors and barristers. It is also unquestionably the case that many lawyer mediators are appointed by the legal advisors to parties because they are known quantities as current or erstwhile, fellow litigators.*

*The situation is likely to change, at least in the commercial field, to the extent that the mediator is becoming a recognised species rather than some sort of hybrid sub-set of an existing professional group, whether lawyers, accountants, architects or other specialists. I have no idea of numbers but there are plenty of non-lawyer arbitrators practising in the construction and maritime fields, each of whom is judged on their proven ability as an arbitrator and whose standing is every bit as high as that of their legally qualified fellows. There is no good reason to believe that the same cannot be true of mediators.*

*The position of the competent, unappointed, non-lawyer mediator is little different from that of the competent, unappointed, lawyer mediator; the parties, when given a choice, preferred somebody else.'* (www. cadr.co.uk/exchange/discussion/003 17 April 2002)



But what would determine the choice between a lawyer mediator and a non-lawyer mediator if, as this lawyer believes, the mediator is not a 'sub-set of an existing professional group?' <sup>76</sup>

### ***Learning capability v defined body of knowledge and expertise***

Commercial mediation does tolerate the idea of a professional discipline:

*'...commercial disputes...generally require some level of experience and expertise from the mediator. Some knowledge of the law and of legal concepts may well also be helpful, particularly when trying to settle cases in the context of pending litigation. An argument against expertise is that the greater the perceived expertise and authority, the more the parties may be influenced into accepting the mediator's authority and moved away from their own control of the resolution'* <sup>77</sup> (Brown and Marriott, 1999: p.141).

Beyond process understanding the professional claim to commercial mediation lies more in learning capability across disciplines and a high level of interpersonal skills than it does on the possession of a highly defined body of technical knowledge or core theoretical model.

It is difficult, if not impossible, to instil through training personal characteristics that pre-figure competence in mediation. The mediator very much uses his or her own personality as an instrument of the mediation through which his or her skills are transmitted. So the expert who works with a defined body of knowledge appears less relevant in commercial mediation but that does not mean that the commercial mediator cannot be an expert in mediation. The point is that mediation is not capable of being reduced to a neat set of skills that guarantee or predict its outcome. The link, therefore, between training and effectiveness is not a secure one because an effective mediator does not get that way by taking lengthy training.

Undoubtedly, there is a compelling drive to undertake training. But the assumption that there is a direct link between training and competence with training being a process that makes a person into a competent mediator which they would not otherwise have been is not what is significant. What is significant is that people are in the position to choose to embark upon more training as a way of connecting their personality and identity within an area of practice where knowledge cannot be standardised, is continually developing, variable and, by nature, uncertain.

---

<sup>76</sup> And setting aside the possibility of lawyer-lawyer favouritism.

The threat, however, lies in the idea of the 'generalist' mediator; the fuzzy middle ground of 'one mediator fits all.' It is increasingly the case that commercial mediators do tend to mediate disputes in areas which they are technically or legally proficient; areas in which they are a professional.<sup>78</sup>

But this is not emerging in mediator training generally. Mediation is an approach, something people can do and acquire skills in their own fields of activity to improve. It is not a profession in the shape of law or medicine but that is different from saying that mediators cannot be professional.

### **Regulation and accountability**

Training, however, soon moves on to the question of accreditation and regulation and to what extent they are necessary. There are a number of mediation organisations that provide both training courses and have an accreditation function but standards may be different. Accreditation, however, is not a definitive measure of competence nor a guarantee for those who have been accredited that they will be able to pursue a career as a commercial mediator.

The more commercial mediation becomes enshrined in the civil justice system the more the likelihood of pressure to set and conform to standards in practice. So where commercial mediation remains a voluntary and without prejudice arrangement between the parties, regulation is less of a concern. But where the courts increasingly refer cases to mediation or strongly urge the parties to attempt mediation, there may be a temptation to make moves to establish a regulatory body to give comfort and confidence to the courts.

This view encompasses professionalisation as a form of social control which stresses the interest of consumer or client protection, safeguarding against bad practice and well-meaning incompetence. The government will need to weigh this against its overall vision of the civil justice system because regulation could lead to prescribing a procedural model for mediation and prohibit the dissemination of the social transformation message of mediation to encourage parties to mediate themselves; that is, where lawyers and other professionals practicing in their own capacities function in a partisan role for their

---

<sup>77</sup> *At a minimum, a theoretical and practical knowledge of negotiation is required but that is not something special to commercial mediators*

<sup>78</sup> *CEDR's selection procedure and matching of mediator to dispute already covers this and indeed there are many recognised mediators in particular sectors such as clinical negligence and construction, for example. Professional background is coupled with personal attributes such as whether the mediator is highly directive or less directive etc. So it is a question of the degree to which a professional is required (lawyer or otherwise) in respect of technical, legal or sector knowledge that clients will expect from the mediator for their particular dispute.*

clients or act as intermediaries, approaching negotiations in the spirit of mediation and avoiding disputes.

Regulation and accountability, however, need not be bundled together; anti-regulation does not mean anti-accountability.

### **Organisation**

Morris, with whom we started this paper, calls for the preservation and value of the diversity of mediation practice (commercial and otherwise) and reacts against aspects of a particular description of professionalisation which focuses on the self-interest of elites.<sup>79</sup> The negative consequences of professionalisation are seen to lie primarily in bureaucratisation, the aspects of which are seen to embody commercial advantage, competitiveness and resistance to alternative forms of accountability. This recalls the picture of professionalisation adopted by Larson (1977) who sees professionalisation as a project of collective social mobility where professionals as a group usually enjoy higher social status than do members of other occupational groups.

But an increase in social prestige does not come about automatically as a by-product of professionalisation. It would have to be a goal deliberately pursued by the professional associations which implement a strategy designed to secure higher social prestige for their members. In the UK there is currently no single mediation organisation which controls or has the capacity to control entry and exit from the community of commercial mediators nor has there been any active lobbying of government for special privileges to say that commercial mediation is different from other occupations so that it can qualify as a profession.

Larson conceptualises professionalisation as a method of social stratification congruent with the system based on wealth. But, as we have already said, this is not the standpoint we adopt. It also misses the more fundamental point that the government's economic strategy encompasses encouragement of the private sector to take on the role of a public sector provider of which commercial mediation is an example. This aspect alone is likely to determine the degree to which government intervention will take place in commercial mediation practice and, therefore, its active rather than passive role in professionalisation.

Commercial mediation is an individualistic practice but for the purposes of accountability and trust, not prestige, mediators will find it difficult to work as individuals without

---

<sup>79</sup> *It would be difficult to deny that no self-interest is involved but that does not mean that there is, at the same time, a genuine concern for clients. Nor does the degree of self-interest or public interest dictate the possibilities of how professionals can organise themselves.*

belonging to a group. But that group does not need to be a conglomerate or single organisation. There is no reason to suggest that commercial mediators cannot work as a network of autonomous groups which do not try to define mediation. The form of accountability, therefore, need not be a highly bureaucratic structure in the model of established professional institutions<sup>80</sup> but can take the shape of peer assessment and accreditation within a practitioner network, coupled with formal client feedback.<sup>81</sup> This questions the assumption that there is a need to bring together the different fields of mediation into a profession that has the same sort of status as, say, law.

### Final reflections on professionalisation

*'It is horrible to think that the world could one day be filled with nothing but those little cogs, little men clinging to little jobs and striving toward bigger ones...This passion for bureaucracy...is enough to drive one to despair. It is as if in politics...we were to deliberately to become men who need "order" and nothing but order, become nervous and cowardly if for one moment this order wavers, and helpless if they are torn away from their total incorporation in it. That the world should know no men but these: it is in such an evolution that we are already caught up, and the great question, therefore, not how we can promote and hasten it, but what can we oppose to this machinery in order to keep a portion of mankind free from this parcelling-out of the soul, from this supreme mastery of the bureaucratic way of life' (Weber, 1921: p. 224)*

*'This whole process of rationalisation in the factory and elsewhere, and especially in the bureaucratic state machine, parallels the centralisation of the material implements of organisation in the hands of the master. Thus, discipline inexorably takes over ever larger areas as the satisfaction of political and economic needs is increasingly rationalised. This universal phenomenon more and more restricts the importance of charisma and of individually differentiated conduct' (Weber, 1921/1968: p.1156)*

Criticisms of the established professions are usually formulated around their monopolistic practice, limiting entry into the market, and pursuing self-regulation to avoid the discipline of the courts and the rigours of the market. But it is precisely the context of the market and the level of bureaucratisation that may be giving rise to a new type of profession that gives it a legitimate role.

---

<sup>80</sup> It is questionable to what extent current forms of professionalised structures actually provide any reliable client protection.

<sup>81</sup> CEDR is already adopting much of this approach.

Put together emphasis on autonomy, a trend towards higher specialisation and individualisation with the increasing influence of business professions such as accountants, lawyers and bankers working on international projects, commercial mediation could be seen as a product for the global market *and* an antidote to some of its manifestations.

If we attach Giddens's view of the transference of trust from professionals to abstract systems to Weber's prophetic but gloomy vision of 'jobsworths,' the practice of commercial mediation can be seen as an attempt to counteract some of the impersonal nature of the delivery of professional services. Personal contact and the ability to deal with human affairs may become increasingly important in a technology based economy which can now offer detailed information or capability on many areas of once defined professional knowledge or expertise.<sup>82</sup>

As to virtue ethics, its big plus is that it makes ethics more sensitive to everyday social and personal complexities which includes what sort of person one should be if one is engaged in a professional activity. The overlap between personal and professional ethics becomes acute and extends to the question to what degree the model of a virtuous agent that is applicable in personal life is also applicable in professional life.

Particularly in a global market, a profession's ethics have to function at a broad societal level which seems, on the face of it, to be difficult to reconcile with an ethical approach whose primary focus is the life and character of individual agents. However, virtue ethics leaves open the door to the idea of professionalism which is not independent of an idea of why professions emerge and what they are for.

In the case of commercial mediation, the 'ideology of professionalism' which is associated with the length of a formal professional education which may, as Hughes describes it, encompass some sort of moral 'saturation' that is somehow self-fulfilling is much less relevant, if at all, than being able to engage in an ethical situation.

At the same time a theory of profession which misses a description of the countervailing ethical tensions which are an intrinsic part of its own conception leave us at best with an incomplete theory or, at worst, with a theory of no consequence. In that sense professionalism and being professional belongs to ethics not the other way around.

---

<sup>82</sup> *'The great change in professions is not the nature of the knowledge which provides their base. The great change is in the nature of the advice. The way to provide advice which appears to eliminate risk and provide certainty to the consumer is to make the delivery of the advice and provide certainty to the consumer is to make the delivery of the advice more impersonal...Advice becomes commoditised.'* (Bruce, 2001: p.5)

It is in this territory where the concept of the trusted mediator intercedes; a concept which holds the tension-ridden connection between professional and business ethics within the similarly tension-ridden relation of being within a profession and being professional. Critical to that holding operation is trust.

### **Moving forward**

Continuing from this exploratory case study:

- (1) Publishers are in the process of being approached and this will involve gathering more illustrative case material; in particular, material from client sources.
- (2) Already in progress as a result of the initial papers referred to on p14 and p16, the researcher was invited to join the Royal Society of Arts Advisory Group on its 'Professional Values' project and will be involved in the facilitation of a one day conference to be held in October 2002 and other events.
- (3) The value emphases identified in the the mediator interviews are positioned in a spectrum between mediation as a negotiation and mediation as an equity process. Prompted by this and the statement made by mediator M8 on p86, an ethics module for CEDR registered mediators is to be drafted. The purpose of the module is to raise awareness of the 'ethical bandwidths' in which mediators are pre-disposed to working.

## BIBLIOGRAPHY

- Altheide, D. and Johnson, J. Criteria for assessing interpretive validity in qualitative research'. In Denzin, N. and Lincoln, Y. (eds) (1994) Handbook of Qualitative Research. Thousand Oaks: Sage.
- Anscombe, G.E.M. Modern Moral Philosophy. In Anscombe, G.E.M. (1981) The Collected Philosophical Papers. Vol. 3. Minneapolis: University of Minneapolis Press.
- Aristotle. Ethics . translation by Thomson, J. and revised by Tredennick, H. (1976) London: Penguin Books.
- Baier, A. (1995) Trust and Antitrust. Moral Prejudices. Essays on Ethics. Harvard: Harvard University Press.
- Barber, B.(1963) Some Problems in the Sociology of the Professions. Daedalus. Fall. pp. 669-688.
- Berg, D. and Smith, K. (eds) (1988) The Self in Social Inquiry: Researching Methods. Newbury Park: Sage.
- Bourdieu, P. (1997) Outline of a Theory of Practice. Cambridge: Cambridge University Press.
- Boulle, L. (2000) Minding the Gaps: Reflecting on the Story of Australian Mediation. Bond Dispute Resolution News Vol. 5 pp. 3-15.
- Brown, H. and Marriott, A. (1999) ADR Principles and Practice. London: Sweet and Maxwell.
- Bruce, R. (2001) Future of the professions. RSA Journal 1/4 2001 pp 4-5
- Buche, R. and Strauss, A. (1961) Professions in Process. American Journal of Sociology 66 (Jan) pp. 325-334.
- Carr-Saunders, A. M. and Wilson, P.A. (1933) The Professions.(New edition 1964) London: Frank Cass.
- CEDR. (2000) ADR Discussion Paper. CEDR Response to the Lord Chancellor's Department.
- Chambers (2001) Chambers Guide to the Legal Profession 2001-2002. Edition 12. London: Chambers and Partners Publishing.
- Cogan, M.L. (1953) Towards a Definition of Profession. Harvard Educational Review 23 (Winter 1953) pp. 33-50.
- Coleman, J. (1988) Social Capital in the Creation of Human Capital. American Journal of Sociology Vol. 94. Supplement 95-120.
- Cook, T.G. (ed) (1973) Education and the Professions. London: Methuen.
- Craib, I. (1998) Experiencing Identity. London: Sage Publications.
- Crisp,R. and Slote,M. (eds) (1997) Virtue Ethics. Oxford: Oxford University Press.
- Dasgupta, P. (1988) Trust as a Commodity. In Gambetta, D. (ed) (1988) Trust: Making and Braking Cooperative Relations. Oxford: Blackwell.
- Dasgupta, P. . Serageldin, I. (eds) (2000) Social Capital:: A Multifaceted Perspective. Washington D. C. The World Bank.
- Dingwall, R. (1976) Accomplishing Profession. Sociological Review 24. pp. 331-349.
- Elliott, P. (1972) The Sociology of the Professions. London: Macmillan.
- Fevre, R. Socializing Social Capital: Identity, the Transition to Work, and Economic Development. In Baron, S., Field, J. and Schuller, T. (eds) (2000) Social Capital. Oxford: Oxford University Press.

- Fielding, A. and Portwood, D. (1980) Professions and the State: towards a typology of bureaucratic professions. Sociological Review 28, pp. 23-53.
- Fine, B. (2001) Social Capital Versus Social Theory: Political Economy and Social Science at the Turn of the Millenium. London: Routledge.
- Fiss, O. M. (1984) Against Settlement. Yale Law Journal . vol.93
- Frederick, R. E. (ed) (1999) A Companion to Business Ethics. Oxford: Blackwell.
- Freidson, E. The Theory of Professions. In Windt, P. et al (eds) (1989) State of the Art in Ethical Issues in the Professions. New Jersey: Prentice Hall.
- Fukuyama, F. (1999) The Great Disruption. Human Nature and the Reconstitution of Social Order. London: Profile Books.
- Gall, M.G., Borg, W.R., Gall, J.P. (1966) Educational Research: An Introduction. White Plains: Longman.
- Gambetta, D. (1988) Can We Trust Trust. In Gambetta, D. (ed) (1988) Trust: Making and Braking Cooperative Relations. Oxford: Blackwell.
- Genn, H. (1998) The Central London County Court Pilot Mediation Scheme Evaluation Report. London: The Stationery Office.
- Giddens, A. (1990) The Consequences of Modernity. Cambridge: Polity Press.
- Giddens, A. (1991) Modernity and Self-Identity: Self and Society in the Late Modern Age. Cambridge: Polity Press.
- Goode, W.J. (1975) Community Within a Community: the professions. American Sociological Review 22, pp.194-200.
- Greenwood, E. (1957) Attributes of a Profession. Social Work 2, No. 3 pp.44-55
- Halmos, P. (1965) The Faith of the Counsellors. London: Constable.
- Halmos, P. (1970) The Personal Service Society. London: Constable.
- Hang, M.R. (1973) Deprofessionalisation: an alternative hypothesis for the future. Sociological Review Monograph 20 (Dec) pp.195-211.
- Hirschman, A. (1984) Against Parsimony: Three Easy Ways of Complicating Some Categories of Economic Discourse. American Economic Review 74. pp. 88-96.
- Hollis, M. (1998) Trust Within Reason. Cambridge: Cambridge University Press.
- Hughes, E. C. (1928) Personality Types and The Division of Labor. American Journal of Sociology 33 pp.754 – 768.
- Hughes, E.C. (1963) Professions. Daedalus. Fall, pp.655-669.
- Illich, I. (1978) The Right to Useful Unemployment. London: Marion Boyars.
- Jackson, J.A. (ed) (1970) Professions and Professionalisation. Cambridge: Cambridge University Press.
- Johnson, M. (1999) Moral Imagination: Implications of Cognitive Science for Ethics. Chicago: University of Chicago.
- Johnson, T. (1972) Professions and Power. London: Macmillan.
- Johnson, T. Professionalism: Occupation or Ideology? In Goodlad, S. (ed) (1984) Education for the Professions. London: SRHE and NFER-Nelson.



- Johnson, T. The State and the Professions: Peculiarities of the British. In Giddens, A. and McKenzie, G.(eds) (1982) Social Class and the Division of Labour. Cambridge: Cambridge University Press.
- Johnson, T. Governmentality and the institutionalisation of expertise. In Johnson, T.,Larkin,G. and Saks, M. (eds) (1995) Health Professions and the State in Europe. London: Routledge.
- Koehn, D. (1994) The Ground of Professional Ethics. London: Routledge.
- Larson, M. S. (1977) The Rise of Professionalism. Berkeley: University of California Press.
- Lincoln, Y. and Guba, E. (1985) Naturalistic Inquiry. Newbury Park: Sage.
- Lord Chancellor's Department. (1999) Alternative Dispute Resolution: A discussion paper. London: The Stationery Office.
- Lord Chancellor's Department. (2000) Alternative Dispute Resolution: Summary of Responses to the Discussion Paper. London: The Stationery Office.
- Lord Chancellor's Department. (2001) Emerging Findings: An early evaluation of the Civil Justice Reforms. London: The Stationery Office.
- Louden, R. (1984) On Some Vices of Virtue Ethics. American Philosophical Quarterly 21. Reprinted in
- Chrip, R. and Slote, M. (eds) (1997) Virtue Ethics. Oxford: Oxford University Press.
- MacIntyre, A. (1971) A short history of Ethics. London: Routledge and Kegan Paul.
- MacIntyre, A. (1985) After Virtue. London: Duckworth.
- Mackie, K. Mediation Futures. In MacFarlane, J. (ed) (1997) Rethinking Disputes: The Mediation Alternative. London: Cavendish Publishing.
- Merriam, S. B. (1988) Case Study Research in Education: A Qualitative Approach. San Francisco: Josey-Bass Publishers.
- Miller, G and Dingwall, R. (eds) (1997) Context and Method in Qualitative Research. London: Sage.
- Morris, C. The Trusted Mediator: Ethics and Interaction in Mediation. In MacFarlane, J. (ed) (1997) Rethinking Disputes: The Mediation Alternative. London: Cavendish Publishing.
- Newton, L. Professionalization: The Intractable Plurality of Values. In Robison, W. et al (eds) (1983) Profits and Professions. Clifton, New Jersey: Humana Press.
- Parsons, T. (1954) Essays in Sociological Theory. New York: Free Press.
- Pritchard, J. Acting Professionally: Something that business organisations and individuals both desire? In Davies, P. W. (ed) (1997) Current Issues in Business Ethics. London and New York: Routledge.
- Pritchard, M. S. (1992) Good Works. Professional Ethics 1.
- Putnam, R. (1993) Making Democracy Work: Civic Traditions in Modern Italy. Princeton: Princeton University Press.
- Raphael, D. (1981) Moral Philosophy. London: Oxford University Press.
- Rawls, J (1971) A Theory of Justice. Cambridge, Massachusetts: Harvard University Press.
- Robson, C. (1993) Real World Research: A Resource for Social Scientists and Practitioner-Researchers. London: Blackwell.
- Schwandt, T. Theory for the moral sciences: crisis of identity and purpose. In Flinders, D. and Mills, G (eds) (1993) Theory and Concepts in Qualitative Research: Perspectives From the Field. New York:
- Scruton, R. (1996) Modern Philosophy. London: Mandarin.

- Scruton, R. (1990) The Philosopher on Dover Beach. Manchester: Carcanet.
- Slote, M. (1992) From Morality to Virtue. Oxford: Oxford University Press.
- Solomon, R. Corporate Roles, Personal Virtues: An Aristotelian Approach to Business Ethics. In Statman, D. (1997) Virtue Ethics: A Critical Reader. Edinburgh: Edinburgh University Press.
- Stake, R. (1995) The Art of Case Research. Newbury Park: Sage Publications.
- Statman, D. (ed) (1993) Moral Luck. New York: University of New York Press
- Smith, A. (1976) An Inquiry into the Nature and Causes of the Wealth of Nations. Chicago: University of Chicago Press. [first published 1776]
- Van Deth, J. W. and Scarbrough, E. (1995) The Impact of Values. Oxford: Oxford University Press.
- Volmer, H.M. and Mills, D.L. (1966) Professionalisation. Englewood Cliffs, New Jersey: Prentice-Hall.
- Weber, M. (1904/1905) (Reprinted 1968) The Protestant Ethic and The Spirit of Capitalism. New York: Scribner's
- Weber, M. (1921) (Reprinted 1968) Economy and Society. Translated and edited by Roth, G. and Wittich, C. New York: Bedminster Press.
- Whitbeck, C. (1992) The Trouble with Dilemmas: Rethinking Applied Ethics. Professional Ethics 1.
- Wilensky, H. L. (1964) The Professionalisation of Everyone? American Journal of Sociology 70.pp.137-158.
- Windt,P., Appleby,P. et al (1989) Ethical Issues in the Professions. Englewood Cliffs, New Jersey: Prentice Hall.
- Woolf, The Right Honourable the Lord. (1995) Access to Justice. London: The Stationery Office.
- Yin, R.K.(1994) Case Study Research: Design and Methods. Thousand Oaks: Sage Publications.

#### Internet sources

- Cooley, J. (2000) Shifting Paradigms: The Unauthorized Practice of Law or the Authorized Practice of ADR . [www.Mediate.com/articles/cooley2.cfm](http://www.Mediate.com/articles/cooley2.cfm) 2001 Feb 2
- Genn, H. (2002) Court-based ADR Initiatives for non-Family Civil Disputes. The Commercial Court and the Court of Appeal. [www.lcd.gov.uk/research/2002/1-02](http://www.lcd.gov.uk/research/2002/1-02) 2002 March 28
- Gerck, E. (1998) Toward Real-World Models of Trust:: Reliance on Received Information. [www.mcg.org.br/trustdef](http://www.mcg.org.br/trustdef) 2001 May 15.
- Little, M. and Feamside, M. (2000) On Trust. The Online Journal of Ethics. [www.depaul.edu/ethics/ontrust](http://www.depaul.edu/ethics/ontrust) 2000 Dec 20
- Lord Chancellor's Department. (2000) Civil.justice.2000: A vision of the Civil Justice system in the Information Age. [www.Lcd.gov.uk](http://www.Lcd.gov.uk) 2002 June 26
- Pellegrino, E. and Carroll, J. (1989) Character, Virtue, and Self-interest in the Ethics of the Professions. [www.llu.edu/llu/bioethics/prov89](http://www.llu.edu/llu/bioethics/prov89) 2001 Feb 15
- Smith, R. (1998) "It doesn't count because it is subjective!" (Re)conceptualising the qualitative researcher role as 'validity' embraces subjectivity. [www.aare.edu.au/98pap/smi98278](http://www.aare.edu.au/98pap/smi98278) 2002 January 26

### Newspaper articles

'Mediators offer little value'. The Lawyer. 13 Mar. 2000 p.33.

'Finding its feet'. The Lawyer. 10 Sept. 2001. p.33

'A case of arrested development'? Legal Week. 5 July 2001. p.28

'Shake on it, pal'. Law Society Gazette. 19 July 2001. p.23.

'The men from the boys'. The Lawyer. 10 Sept. 2001 p.37